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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

298,999, No. 314, 315 & 324

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below),

Petitioner,

against

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF THEREON

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Furthermore, this Court's decision in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, has in effect approved *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332 27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN F. McCARTHY (with whom THE CHASE NATIONAL BANK of the City of New York was impleaded below),

Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as successor to the Alien Property Custodian.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John F. McCarthy, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court made in the above cause on June 2, 1950.

This petition is a companion to the petition filed simultaneously herewith entitled "John F. McCarthy (with whom the Federal Reserve Bank of New York was impleaded below), petitioner, vs. J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian."

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[1] J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General.

Both cases were brought by the Attorney General to test the validity of a New York State Court attachment issued in a single action instituted by petitioner against Reichsbank, a German bank, and levied upon its accounts maintained with The Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, the Attorney General filed two separate proceedings in the District Court, one relating to the accounts with the Chase Bank and the other to the accounts with the Federal Reserve Bank. Each bank was a party only to that proceeding which involved the particular accounts maintained with it. Both in the District Court and the Court of Appeals the two cases were decided by a single opinion, although they were presented by separate records and briefs and resulted in separate judgments. The banks did not appeal from the District Court judgments.

Jurisdiction

The date of the judgment to be reviewed is June 2, 1950. A petition for rehearing was filed on June 16, 1950, and denied on June 27, 1950.

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code, Section 1254.

The original and requisite copies of the record are on file in this Court. The records in the instant case and in the companion Federal Reserve case have been bound together and designated respectively Parts I and II.[2]

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[2] Record references are as follows: "IR" refers to the record in the instant case; "IIR" refers to the record in the Federal Reserve case. References are to folios, except as otherwise indicated.

Summary Statement of the Matter Involved

Frank W. Mondell, a resident of the District of Columbia, and who was a member of the 54th (1895-1897) and 56th-67th (1899-1923) Congresses, majority floor leader in the 66th and 67th Congresses, and Director of the War Finance Corporation (1923-1925), performed certain legal services for and at the special instance and request of the Reichsbank (IR 167), a German banking corporation not doing business in New York. His claim for compensation for such services was unpaid at the time of his death in August 1939. Letters of Administration with his will annexed were duly granted by the United States District Court for the District of Columbia to William H. Mondell who, after qualifying as administrator, duly assigned the decedent's claim against Reichsbank to your petitioner, a New York resident and citizen of the United States (IR 168).

When Germany invaded Norway and Denmark, the President invoked Sec. 5 (b) of the Trading with the Enemy Act and issued Executive Order No. 8389, freezing property in the United States belonging to Norway and Denmark and their nationals on or since April 8, 1940, in order to assure that title in such property could not be acquired by Germany through the conquest of those countries. In Section 7 of the Order the President delegated to the Secretary of the Treasury the power to administer the freezing controls. By Congressional Joint Resolution enacted May 7, 1940, Sec. 5 (b) was amended to cover stocks and other securities by the insertion of provisions for regulation of dealings in "evidences of indebtedness or evidences of ownership of property", and the Executive Order and regulations and rulings issued thereunder were also approved and confirmed.

The purpose of the Joint Resolution is found in the following exchange which occurred betweeen Senator Con-

nally and Senator Wagner, Chairman of the Committee on Banks and Currency, which had reported out the resolution (86 Cong. Rec. 5007):

> "Mr. Connally: And is not this measure for the purpose of *preventing change of title* of the property here in the United States by conquest, or by any other forceable or violent means?
>
> "Mr. Wagner: That is exactly the purpose." [Italics supplied.]

By the Joint Resolution it was also intended that United States citizens having claims against owners of blocked property would be protected by the freezing controls, as is apparent from the following statement of Senator Barkley (86 Cong. Rec. 5006):

> "It should also be stated—and I am sure the Senator [Wagner] omitted it by oversight—that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities, and other property in the United States, but it is also intended to protect American citizens in the event they have claims of any sort growing out of these transactions, and we preserve the property not only for its owners but for the benefit of Americans who may have claims."

As Axis conquest progressed, Executive Order No. 8389 was extended to other countries, and on June 14, 1941, it was made applicable by Executive Order No. 8785 (6 F. R. 2897) to all other remaining continental countries, including Germany.

The Executive Order, Section 1, forbade the transactions in blocked property therein specified unless

> "*authorized* by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, *or otherwise*, * * *." [Italics supplied.]

Although the words of the Executive Order did not forbid the commencement of suits by United States citizens against blocked nationals, including German nationals, by attachment of their property within the Court's jurisdiction, nevertheless, hundreds of applications were submitted to the Secretary by prospective litigants for authorization to attach blocked assets. Answering these requests, the Secretary ruled that a license was not required because the bringing of an action and the attachment therein of blocked property were not forbidden by the freezing controls but that, if the attaching creditor recovered a judgment against the blocked national, a license would be required before the attached blocked funds could be paid to satisfy the judgment.

The Attorney General has stipulated here (IR 256, 264-267) the following facts:

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freez-

ing' control program adopted the position, in response to numerous requests made of him, *that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property* found within the jurisdiction of the court which issued the warrant *were not forbidden* but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. *A license to institute the action and levy the attachment was in fact not required by the Treasury Department.*" [Italics supplied.]

On January 21, 1942, your petitioner brought an action against Reichsbank in the New York Supreme Court, Kings County, to recover $24,810. with interest thereon from May 30, 1939, for the legal services rendered Reichsbank by Frank W. Mondell. On the same day a warrant of attachment duly issued out of the New York Court to the Sheriff of the City of New York who levied upon the accounts of Reichsbank with the Chase Bank, among others, by serving on that day a certified copy of the warrant on the Chase Bank (IR 21, 168). Thereafter the summons was served upon Reichsbank by publication in accordance with the terms of an order of the New York Court and, as directed by said order, copies of the summons, complaint, the order for publication and notice to the defendant, were mailed

to the Attorney General of the United States on behalf of Reichsbank, as then required in such case by Rule 50 of the New York Rules of Civil Practice. The Attorney General acknowledged receipt thereof. Neither Reichsbank nor the Attorney General appeared in the action or took any steps therein, and on April 24, 1942, judgment was entered in petitioner's favor against Reichsbank for $29,660.21 (IR 168-174).

Since the accounts levied upon were still "frozen", they were not turned over by the Chase Bank to the Sheriff to be applied in satisfaction of the judgment. From time to time the New York Supreme Court ordered the time extended within which the Sheriff might institute proceedings to reduce the attached accounts to his possession, and the orders of extension were duly served upon the bank (IR 115-117). By reason thereof the accounts continue under attachment (N. Y. Civil Practice Act, Sec. 922). The warrant of attachment is still outstanding and has never been vacated or modified, nor has it been released or discharged, or annulled (IR 117, 187).

Some four and one-half years thereafter, and on October 3, 1946, the Alien Property Custodian executed Vesting Order No. 7792, purporting to vest the debts or other obligations owing Reichsbank by the Chase Bank arising out of dollar checking accounts maintained by Reichsbank with the Chase Bank, including any and all rights to receive, demand, enforce and collect the same (IR 37-44). By letter of November 26, 1946, the Office of Alien Property, Department of Justice, as successor to the Alien Property Custodian, directed the Chase Bank to forward checks for the amounts represented by the accounts to his office (IR 47, 51-53). The Chase Bank refused to comply with this direction until the Sheriff released the warrant of attachment (IR 82).

Fourteen months thereafter, and on January 23, 1948, the Attorney General, as successor to the Alien Property

Custodian, instituted the proceeding in the District Court by petition and order to show cause directed to the Chase Bank, the Sheriff, your petitioner, and one Zittman, another attaching creditor of Reichsbank. The Attorney General sought, as against your petitioner, a decree declaring (1) that by virtue of Executive Order No. 8389, as amended your petitioner and the Sheriff obtained no lien or other interest in the Reichsbank accounts with the Chase Bank, which had been attached by petitioner in his New York action and (2) that by virtue of the Vesting Order the Attorney General is entitled to these accounts (IR 29).

In his brief in the District Court the Attorney General took the position that he was "requesting only a declaration of rights"; that he "does not seek an order * * * directing that the funds be surrendered to him"; and that "the nature of the judgment requested will interfere with possession of the state court under the writs of attachment only to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here."

Furthermore, the Attorney General made the following concession in his brief in the District Court:

> "But for the impact of Executive Order No. 8389 as amended, and regulations of the Treasury Department issued pursuant thereto, it is conceded that under the law of New York both the attaching creditors and the Sheriff would have acquired liens on the applicable funds through the attachments and levies."

Although the District Court found (IR 303) "that the Treasury Department advised prospective litigants that no license was necessary to bring suit and secure the issuance of a warrant of attachment", nevertheless, the Court considered itself "bound" by the decision of the Court of

Appeals for the Second Circuit in *Clark* v. *Propper*, 169 F. (2d) 324 (IR 299, 302), and granted the relief sought by the Attorney General.

The Court of Appeals for the Second Circuit affirmed the decree of the District Court "on the authority of *Propper* v. *Clark*, 337 U. S. 472", in which case there was involved a New York State Court order appointing a permanent Receiver and actually directing the transfer of an Austrian corporation's claim to the Receiver, and this Court held that the "freezing order" was merely directed against "shifts in title to blocked assets". In that case the Receiver contended that "a vesting of title" in him was "an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a non-resident" served by publication, and this Court disposed of this contention by pointing out that the New York Court could have acquired jurisdiction over the assets within New York of a blocked national in a way other than by seizure of title such as, for example, by an attachment.

Statutes and Executive Order Involved

The pertinent statutes are the Trading with the Enemy Act, approved October 6, 1917, as amended, particularly Sections 5 (b) and 7 (b); the Joint Resolution of May 7, 1940, amending Section 5 (b) of the Trading with the Enemy Act and approving Executive Order No. 8389; The New York Civil Practice Act, Sections 520, 645, 916, 917, 922, 948 and 969, and the New York Judiciary Law, Sections 750, 753 and 773.

The Executive Order involved is Executive Order No. 8389, as amended.

The relevant provisions of the statutes and Executive Order are collected in the Appendix annexed to the brief attached hereto.

Questions Presented

The questions presented are:

First. Whether the commencement of petitioner's suit against Reichsbank in the New York Court and the levy of the warrant of attachment issued therein for jurisdictional purposes upon the blocked accounts of Reichsbank with the Chase Bank were forbidden by Executive Order No. 8389, as amended.

Second. Assuming, but without conceding, that by the words of Executive Order No. 8389, as amended, the commencement of suits by attachment of blocked assets was forbidden "unless authorized by the Secretary of the Treasury by means of regulations, rules, instructions, licenses, or otherwise" (the Order, Section 1), whether the attachment for jurisdictional purposes of Reichsbank's blocked accounts with the Chase Bank in aid of the New York action by petitioner, an American citizen, against Reichsbank, a non-resident blocked national, was authorized by the Secretary of the Treasury in view of the Attorney General's concession in this case that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action" (1R 265).

Third. Whether this case is controlled by *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, decided June 5, 1950, or by *Propper* v. *Clark*, 337 U. S. 472.

Fourth. Whether the District Court was required to give full faith and credit to petitioner's New York attachment, and to decline to entertain this cause.

Specification of Errors

The United States Court of Appeals erred:

First. In deciding that petitioner's attachment was forbidden by Executive Order No. 8389, as amended, and, therefore, invalid.

Second. In refusing to hold that petitioner's attachment was authorized by the Secretary of the Treasury and, therefore, valid.

Third. In deciding that this case is controlled by *Propper* v. *Clark*, 337 U. S. 472.

Fourth. In refusing to hold that the District Court should have given full faith and credit to petitioner's attachment and should have declined to entertain this cause.

Fifth. In affirming the decree of the District Court and refusing to reverse such decree and direct dismissal of the Attorney General's petition.

Reasons Relied On for the Allowance of the Writ

1. The decision of the court below clearly conflicts with the decision of the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332.

In the *Polish Relief* case, a Delaware non-profit corporation commenced an action by attachment of defendant's accounts with New York banks. Defendant appeared specially to contest jurisdiction upon the ground (288 N. Y. 337) that Executive Order No. 8389 "so far immobilized its deposit accounts * * * as to render them wholly unattachable in the absence of a lifting license of the Secretary of the Treasury." The United States submitted to the New York Court of Appeals a brief *amicus curiae* in which was made the same concession of fact as is set forth

in paragraph 5 of the stipulation of fact in the instant case and the further concession (p. 39 of the Government's brief in that case) that

> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action."

In sustaining the validity of the attachment, the New York Court of Appeals held (p. 338):

> "The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff. (Cf. *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, 200.) The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction *in rem* over the deposits in question. * * *
>
> As *amicus curiae*, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination."

2. The decision of the court below clearly conflicts with the decision of the District Court in *Sun Insurance Office Limited* v. *Arauca Fund*, 84 F. Supp. 516.

There, the libelant filed on July 11, 1941, a libel *in personam* with clause of general attachment in a cause of general average against a German steamship company, and on July 12, 1941, when the Executive Order was in force

with respect to German property, the SS. "Arauca", belonging to the Germany company, then in Port Everglades, Florida, was attached. As found by the court (p. 518), the libelant "did not apply for or procure a license under the said Executive Order authorizing the attachment of the 'Arauca' ". The U. S. Maritime Commission requisitioned the ship on July 28, 1941, and deposited with the U. S. Treasurer a sum on account of just compensation for the vessel's requisition. On October 28, 1942, the Alien Property Custodian vested all property of or owing to the German company in an action *in rem* by the libelant against the deposited fund. The Attorney General, as successor to the Custodian, appeared as claimant contending that the libelant did not have a valid attachment lien on the vessel because a license under the Executive Order had not been applied for or procured authorizing the attachment. Judge Holland held, as a matter of law (pp. 518-519):

> "On the date of the requisition of the 'Arauca' by the United States Maritime Commission, July 28, 1941, the libelant herein had a valid attachment lien on the vessel by virtue of its attachment of July 12, 1941, notwithstanding the fact that no license authorizing said attachment was secured from the Secretary of the Treasury under the provisions of Executive Order 8389. No license or permit under said Executive Order was required to validate libelant's attachment lien."

3. The decision below conflicts with the decision in *Murray Oil Products Co.* v. *Mitsui & Co., Ltd.*, 55 F. Supp. 353, affirmed 146 Fed. [2d] 381.

In that case the New York office of the defendant, a Japanese corporation, was taken over by the U. S. Treasury Department on December 8, 1941, and placed in liquidation until on or about August 17, 1942, when the Alien Property Custodian vested title to the defendant's prop-

erty in the United States. Meanwhile, and on December 17, 1941, plaintiff commenced an action against the defendant in the New York Supreme Court and procured a warrant of attachment which was levied by the Sheriff on December 23, 1941, on the defendant's bank balances with the National City Bank and the Chase Bank in New York City. The action was thereafter removed to the Southern District. As appears from an affidavit of plaintiff's attorney found at page 26 of the Record on Appeal to the Court of Appeals for the Second Circuit, the Sheriff was informed at the time of the levy "that the attached sums would be held subject to Executive Order 8389" and, therefore, plaintiff's attorney "perceived no necessity of having the attached amount physically turned over to the Sheriff in advance of the judgment in the action" and "made no application for the necessary license and took no steps to compel the turning over of the funds to the Sheriff."

In his affidavit plaintiff's attorney also stated (at p. 28 of the Record on Appeal) that on March 18, 1942, he informed by letter the Treasury Department, Alien Property Custodian, and the Department of Justice, of the attachment action against Mitsui and the steps taken therein and inquired whether there was any objection by them, or any other agency of the government to the prosecution of the action during the pendency of the war; that the Department of Justice made no objection and J. W. Pehle, Assistant to the Secretary of the Treasury, by letter dated April 17, 1942, specifically stated that "the Treasury Department will interpose no objection", and that the Alien Property Custodian's general counsel by letter dated April 28, 1942, referred to the Executive Order and suggested that plaintiff's attorney "apply to the Federal Reserve Bank of New York for information regarding the application of provisions of this Executive Order to the satisfaction of a claim of your client or of a judgment rendered in its favor out of assets belonging to Mitsui & Co., Ltd., which are now frozen."

The District Court for the Southern District granted judgment in plaintiff's favor in that case, long after the Custodian had vested the attached accounts, stating (55 F. Supp. at p. 356):

> "* * * Ordinarily the judgment would be satisfied in whole or in part out of the monies attached, but, it appears, they have passed into the possession of the Alien Property Custodian. It is conceded that it will be necessary for the plaintiff to file a claim with him. The judgment will be evidence of the debt.
>
> "It may be that the Alien Property Custodian has sufficient assets in his possession to satisfy all of the creditors of Mitsui & Co. Ltd., in full. On the other hand the liabilities of the defendant, at least the claims which have been or may be filed with the Alien Property Custodian, may exceed the assets in his possession.
>
> "The plaintiff should be entitled to litigate any right to a preference which it claims by reason of the attachment and levies thereunder. That issue has been created by the operation of the Trading with the Enemy Act, 50 U. S. C. A. Appendix § 1 et seq."

On the defendant's appeal "taken by direction of * * * the Department of Justice and the Alien Property Custodian" (see, Notice of Appeal at p. 67 of the Record on Appeal), the Court of Appeals for the Second Circuit affirmed the judgment with an opinion by Judge Learned Hand.

4. The decision of the court below conflicts with this Court's decision of June 5, 1950, three days after the decision below, in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, affirming judgments of the New York Court of Appeals which sustained the validity of preferential claims under New York law against the Superintendent of Banks, as Liquidator for the Custodian of the New York branch of the Yokohama Specie Bank, Ltd.,

based on voluntary unauthorized transactions in frozen funds. Although the Custodian, who had vested the "excess proceeds of the business and property * * * of The Yokohama Specie Bank, Ltd." (299 N. Y. 125), appeared as *amicus curiae* in those cases before the New York Court of Appeals, as well as before this Court, and advanced the very contentions made by the Attorney General below, the New York Court of Appeals held (299 N. Y. 790, 791) that "the provisions of Executive order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, * * *".

The decision of this Court in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran* was called to the attention of the court below by petition for rehearing (IIR p. 108), but the petition was denied without opinion (IIR p. 121).

5. Since this Court in *Propper* v. *Clark*, 337 U. S. 472, (a) held that the freezing order was merely directed against "shifts in title to blocked assets", (b) clearly pointed out that this Court was not deciding "whether every determination of rights concerning blocked property" in unauthorized "litigation is voidable", and (c) indicated that an attachment of blocked assets within New York of a nonresident as a prerequisite to the exercise of jurisdiction *in rem* is not forbidden by the Executive Order because an attachment is not a seizure of title, and since in the instant case the Attorney General concedes that the attachment was not forbidden and was also authorized, the court below erred in deciding that petitioner's attachment is invalid on the authority of *Propper* v. *Clark*.

6. The decision of the court below in effect deprives citizen creditors in the United States of the right to sue by attachment their non-resident debtors who are na-

tionals of blocked countries and deprives American citizens of their right, recognized by Section 7 (b) of the Trading with the Enemy Act, to sue their non-resident alien enemy debtors by attachment.

7. Since a violation of the Executive Order is an offense under Section 5 (b) of the Trading with the Enemy Act, subjecting the offender to a prison term and fine, the decision of the court below stamps the levy of petitioner's attachment as an offense under the Order, notwithstanding that the Order does not plainly and unmistakably forbid suits by attachment of blocked assets and, also, that the attachment was concededly authorized.

8. The precise issue involved in this case has never been squarely passed upon by this Court, and petitioner has been advised that this cause and the companion Federal Reserve case were brought by the Government as test cases, on the ultimate fate of which will depend the validity of numerous attachment actions and judgments recovered therein by American citizens against blocked nationals and non-resident alien enemies. As at August 18, 1950, the New York City Sheriff has paid out over $2,000,000 of attached blocked funds to satisfy judgments, payment of which was licensed by the Treasury after judgment. There are also pending in New York County alone 49 cases in which the Sheriff has attached over $16,000,000 of blocked funds or property not including securities and other property of an undetermined value (See Appendix, p. 44).

The questions here involved are of general importance, and questions of substance relating to the administration of the freezing control program. The record on appeal establishes that petitioner's attachment of Reichsbank's accounts with the Chase Bank did not involve foreign confiscation or duress and was not levied for any hostile or subversive purpose, or for any purpose contrary to the

interest or policy of the United States, but, on the contrary, was the exercise by an American citizen of a remedy for the collection of his claim against a non-resident alien enemy, as the laws of New York gave him. Furthermore, as has been pointed out, the Attorney General has conceded here that the attachment was not forbidden and was also authorized.

Wherefore, your petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause, there entitled *J. Howard McGrath*, Attorney General, as successor to the Alien Property Custodian, Petitioner-Appellee, v. *Chase National Bank of the City of New York* and *John J. McCloskey, Jr.*, as Sheriff of the City of New York, and *Leo Zittman* and *John F. McCarthy*, Respondents-Appellants, that said cause may be reviewed and determined by this Court, and that the judgment of the said United States Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

JOHN F. MCCARTHY,
Petitioner.

By HENRY I. FILLMAN,
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September 12, 1950.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740, and may be found on page 97 of the record in the instant case (IR p. 97). The *per curiam* opinion of the Court of Appeals for the Second Circuit is reported at 182 F. 2d 349, and may be found at page 99 of the record in the Federal Reserve case (IIR p. 99).

ARGUMENT

I

Since, as a matter of law, petitioner had the right to commence his action against Reichsbank by levy of the attachment on its accounts with the Chase Bank, and since Executive Order 8389, as amended, as the Attorney General by the stipulation has here conceded, did not forbid suits by attachment of blocked assets, petitioner's attachment levied on January 21, 1942, on the accounts of Reichsbank with Chase was not forbidden by the Order and, therefore, was valid.

As a matter of law, petitioner could sue Reichsbank in the New York courts on January 21, 1942, when the United States was at war with Germany, though Reichsbank could not sue in our courts.

McVeigh v. *United States*, 11 Wall. 259;
University v. *Finch*, 18 Wall. 106, 111;
Porter v. *Freudenberg* [1915], 1 K. B. 856, 882.

The Congress recognized the common law right to bring suit in the courts of the United States against alien enemies by expressly providing in Section 7 (b) of the Trading with the Enemy Act [40 Stat. at p. 417], as follows:

> "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] * * . And provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

Since Reichsbank, an alien enemy, is a German corporation and a nonresident of New York, personal service on it in the State of New York in order to give the New York court jurisdiction of petitioner's action could not have been made. Petitioner's action could only have been brought upon substituted service of process by publication. But such substituted service is only effectual where a warrant of attachment has previously issued and a levy made on property of the defendant in the State.

> *Pennoyer* v. *Neff*, 95 U. S. 714;
> *Helme* v. *Buckelew*, 229 N. Y. 373;
> *Dimmerling* v. *Andrews*, 236 N. Y. 43;
> *McCarthy* v. *Culkin*, 254 N. Y. 328;
> *Schram* v. *Keane*, 279 N. Y. 227, 233-234.

Manifestly, unless Reichbank's accounts with the Chase were attached and proof thereof made when petitioner applied to the New York Supreme Court for an order of substituted service by publication, jurisdiction of Reichsbank or of its property could not have been acquired by the New York court, with the result that petitioner could

not have maintained his action. Control by the New York court of the *res* in the State was the foundation of jurisdiction of petitioner's action, and that jurisdiction, if obtained at all, could only have been obtained by the levy of a warrant of attachment upon Reichbank's accounts with the Chase.

Riverside & Dan River Cotton Mills v. *Menafee*, 237 U. S. 189;
Helme v. *Buckelew, supra.*

Since petitioner, as a matter of law, had the right to sue Reichsbank, and since it was essential that petitioner obtain and levy a warrant of attachment on property of Reichsbank in New York in order to give the New York Court jurisdiction, it follows that petitioner had the right to institute his action on January 21, 1942, by the levy of the attachment warrant upon Reichsbank's accounts with the Chase.

Watts, Watts & Co., Ltd. v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 21-22;
Hepburn's Case, 3 Bland (Md.) 95, 120, 121;
Dorsey v. *Kyle*, 30 Md. 512, 520;
Mixer v. *Sibley* 53 Ill. 63, 70.

It is plain that the words of Executive Order No. 8389, made applicable to Germany in peacetime on June 14, 1941, do not forbid the commencement of suits in United States courts against nonresident German nationals by attachment of their property within the Courts' jurisdiction. It cannot be said from the language used in the Order that the President made his position in this respect self-evident. The failure to express clearly an intention to forbid suits by attachment of blocked assets is emphasized by the language used in other proclamations or executive orders to prohibit attachments. For example, in the

proclamation of December 26, 1917, taking over the control of the railroads the President stated that "Except with the prior written assent of said director, no attachment by mesne process * * * shall be levied on" the property of the railroads used in their business as common carriers (see *Dooley* v. *Pennsylvania R. Co.*, 250 Fed. 142, 143).

More recently, President Truman's executive order of August 25, 1950, providing for taking over the country's railroads and for their operation by the Secretary of the Army in the name of the United States Government provides in part as follows:

> "8. Except with the prior written consent of the Secretary, * * * no attachment by mesne process, garnishment, execution or otherwise shall be levied on or against any of the real or personal property or other assets of any such carrier; * * *."

The very definiteness with which an attachment was forbidden in these Presidential Orders and the absence of such a prohibition in Executive Order No. 8389, leads a reasonable person to believe that the President did not intend by the freezing order to prohibit suits by attachment of frozen assets.

That the freezing order did not forbid the commencement of suits against blocked nationals by levy of a warrant of attachment was decided by the New York Court of Appeals in *Commission for Polish Relief Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 322, and by the Federal Court in *Sun Insurance Office, Limited* v. *Arauca Fund*, 84 F. Supp. 516.

There is no conflict between petitioner's New York attachment action and the freezing order. This is clear from the opinion of the City Court of New York, New York County in *Metallo-Chemical Corp.* v. *Banque Trans-*

atlantique S. A., 67 N. Y. Supp. (2d) 187.[3] The Court there said, at pages 188-189:

> "These requirements were in no way suspended by the Executive Order, nor as Commission for Polish Relief v. Banca Nationala a Rumaniei, 288 N. Y. 332, 43 N. E. 2d 345, makes plain, is there any necessary conflict between the Order and the New York statutes. Proceeding under both all steps under an attachment may be taken except one; the only restraint upon the bank was that it could not pay over to the Sheriff a debt which was in a 'blocked account.'
>
> "The plaintiff was not required to sue when the bank failed to pay over. But it was required to keep the attachment alive for jurisdictional purposes, Civil Practice Act, § 922, either by suing or by having its time to do so extended until the freezing restrictions had been removed, or a license to pay over granted. If the plaintiff, with the Order still in effect had sued the bank, the latter might have justified its refusal to pay by referring to the lack of power to do so; if judgment had gone against it, it might again rely on the Order to stay its enforcement, where as here, it admits its indebtedness to the defendant. Or it might even have been required to pay over the blocked account to the Sheriff 'to the credit of this action' to await the event and the further order of the court, 288 N. Y. 332, 338, 43 N. E. 2d 345, 347; Civil Practice Act, § 940. But whatever the outcome of an action against the Bank in aid of the attachment, the matter would remain in *status quo* within the limitations imposed by the Order. *The plaintiff would be free to proceed to judgment in the principal case, but there would*

---

[3] The Attorney General conceded in the stipulation (IR 267) that the Treasury subsequently issued a license, attached to the stipulation as Exhibit B (IR 280), authorizing the payment of the judgment recovered by the plaintiff in that action.

be no payment until the Government released its hand. Our Courts will determine whether the plaintiff should succeed and whether it has proceeded in a manner that would entitle it to the benefits of an attaching creditor; the Government will not interfere with that judgment but will not permit the plaintiff to collect the amount awarded until it first decides that the receipt of the money by the plaintiff will not offend the objectives of the Order and of the Trading with the Enemy Act. Thus the two provisions, state and federal conjoin to declare the plaintiff's right, and there is no conflict between them." (Italics supplied.)

Apart from the foregoing, the Attorney General has conceded that the freezing order does not forbid the commencement of suits by attachment of blocked assets for he stipulated (IR 265-266) that the Secretary of the Treasury adopted the position, in response to numerous requests, that the bringing of an attachment action and the levy of an attachment upon blocked property "were not forbidden" and that a license "to institute the action and levy the attachment was in fact not required by the Treasury Department." Furthermore, in his brief below, at page 24, he said:

> "Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated (266)."

II

Assuming, but without conceding, that the Executive Order lawfully forbade the commencement of suits by attachment of blocked assets unless authorized by the Secretary of the Treasury, nevertheless, the Secretary authorized commencement of suits by levy of attachments upon such assets.

The Executive Order provides in Section 1 that the transactions therein specified are forbidden unless

> "*authorized* by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, *or otherwise*, * * *." (Italics supplied.)

The word "authorized" means, when considered with the context, "permitted", and its use in this context reserved to the Secretary of the Treasury the right to permit a transaction covered by the order by means of regulations, or rulings, or instructions, or licenses, or otherwise." In other words, the Secretary was given the right to permit a transaction in any manner he saw fit.

It is apparent from the quoted language of the Order that great confusion is introduced if one speaks of a "license" under the Order, which is not what the order speaks of, and does not reserve the word "license" for one of the many methods by which the Secretary can *authorize* a transaction covered by the Order.

The Attorney General has conceded by the stipulation (IR 263) that from the inception of "freezing" controls all litigants who proposed to sue by attachment of blocked assets, and had requested the Secretary to authorize an attachment or levy by a license, were advised as follows:

> "Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the

> United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national."

This amounted to an authority to all plaintiff litigants, including petitioner, to bring suit by attachment of blocked assets. In other words, it is an authorization given to the proviso to Executive Order 8389.

It was so recognized by the government of the United States in its brief *amicus curiae* submitted to the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, for at page 39 of the brief the government set forth the advice to prospective litigants quoted above and then went on to state:

> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action."

The legal result of this authorization of the Secretary is that not only were all litigants, including petitioner, permitted to bring suit by attachment of blocked assets, but that the attachment itself is to be regarded as valid.

III

Propper v. _Clark_, 337 U. S. 472, cannot be regarded as authority for the proposition that Executive Order No. 8389, as amended, forbade the commencement of actions against blocked nationals by attachment of their assets, particularly since the Attorney General has conceded that such attachments were authorized, but, on the contrary, this Court's decision in that case indicates that the Executive Order does not forbid such attachments.

Furthermore, this Court's decision in _Lyon_ v. _Singer_ and _Lyon_ v. _Banque Mellie Iran_, 339 U. S. 841, has in effect approved _Commission for Polish Relief, Ltd._ v. _Banca Nationala a Rumaniei_, 288 N. Y. 332.

The transaction involved in the *Propper* case was an unauthorized transfer by judicial order of title to blocked property from an Austrian corporation to a receiver appointed under Section 977 (b) of the New York Civil Practice Act. This Court held that the freezing order merely directed against "shifts in title to blocked assets", and clearly pointed out that it was not deciding "whether every determination of rights concerning blocked property" in unauthorized "litigation is voidable." This is manifest from the following, at page 486 of the report:

> "It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to

blocked assets and the prohibition of the Executive Order against transfers of such a credit as this."

But, the levy of a provisional attachment under New York law does not shift the title to the attached property, which is merely held in the custody of the law as security for any judgment which the attaching creditor may recover.

Klinck v. *Kelly*, 63 Barb. (N. Y.) 622, 629;
Columbia Bank v. *Ingersoll*, 21 Abb. N. Cas. (N. Y.) 241;
Fielmann v. *Brunner*, 2 Hun (N. Y.) 354, 356, 357;
Embree v. *Hanna*, 5 Johns. (N. Y.) 101, 103;
West Virginia Pulp & Paper Co. v. *People's Home Journal, Inc.*, 233 App. Div. (N. Y.) 376, 377;
Sanders v. *Armour Fertilizer Works*, 292 U. S. 190, 208 (dissenting opinion of Mr. Justice Cardozo citing *Embree* v. *Hanna, supra*, as the authority in New York);
Elkay Reflector Corporation v. *Savory, Inc.*, 57 F. (2d) 161;
Steingut v. *National City Bank of New York*, 38 F. Supp. 451, 452.

Moreover, in the *Propper* case the government did not concede that the appointment of the permanent receiver under Section 977 (b) of the New York Civil Practice Act was not forbidden by the Order and it did not appear that the Treasury had authorized such an appointment, whereas, in the case at bar the Attorney General has not only conceded that the Order does not forbid the commencement of suits by attachment of blocked assets, but, also, that the Treasury authorized such suits.

In addition, this Court's opinion in the *Propper* case indicates clearly that the bringing of an action by attachment of blocked assets was not forbidden, because an attachment does not seize title to the attached property.

Propper contended that "a vesting of title" in the receiver was "an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a non-resident" served by publication. This Court pointed out that the New York Court could have acquired jurisdiction over the blocked assets in a way other than by seizure of title such as, for example, by an attachment. This is apparent from the following (p. 488):

> "Petitioner contends here for the first time that a vesting of title in the temporary receiver is an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a nonresident association which is served by publication. The contention is that an affirmance of the court below on the issue of state law will render proceedings under § 977-b subject to an attack on constitutional grounds under the doctrine of *Pennoyer* v. *Neff*, 95 U. S. 714. In our opinion the argument is without merit. *Pennoyer* v. *Neff* merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at page 733 that for an *in rem* action it is sufficient that the property be within the state, subject to the control of the court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. Cf. *Milliken* v. *Meyer*, 311 U. S. 457, 463. The first requirement can be met *in other ways than seizure of title*, e. g., by an injuction against transfer of the property, *Pennington* v. *Fourth National Bank*, 243 U. S. 269; *by an attachment*, *Herbert* v. *Bicknell*, 233 U. S. 70; * * *." (Italics supplied.)

Furthermore, in sustaining the New York Court of Appeals judgments in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, for the reason that federal control over alien property remained undiminished because the New York court conditioned enforcement of the preferential claims of

Singer and Banque Mellie Iran upon licensing by the Alien Property Custodian, this Court has in effect approved the holding of the New York Court of Appeals in the earlier case of *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, in which the theory or rationale underlying the decision is the same as in the *Singer* and *Mellie Iran* decision, namely, the freezing controls did not prevent the accrual or creation of claims or rights, including attachment liens, or render them void, but merely prevented payment from the blocked assets in satisfaction thereof without federal authorization.

This Court also indicated in *Singer* and *Mellie Iran* that the *Propper* case is inapplicable in the case at bar involving, as in *Singer* and *Mellie Iran*, a "right, title and interest" vesting order (IR 312; 299 N. Y. 113, 139), because Propper, as receiver, "claimed title" to the blocked assets "adversely to the Custodian, and sought to deny the Custodian's power to vest the property", and no such result would follow from the judgments in *Singer* and *Mellie Iran*. So, too, the *Propper* case is not controlling here for the reason that petitioner does not claim title to the frozen Reichsbank accounts with Chase adversely to the Custodian and does not deny his paramount power to vest, but claims a lien thereon by his attachment, concededly authorized, and for the further reason that federal control over the property remains undiminished because the enforcement of petitioner's claim by payment of the judgment recovered in his attachment action against Reichsbank is under the *Polish Relief* case, conditioned upon licensing by the Alien Property Custodian.

IV

The District Court was required to give full faith and credit to the New York attachment and should have declined to entertain this cause.

The levy of petitioner's attachment on Reichsbank's accounts with the Chase Bank brought the accounts under the jurisdiction of the New York Court.

> *Cooper* v. *Reynolds*, 77 U. S. 308, 317;
> *Matter of United States of Mexico* v. *Schmuck*, 294 N. Y. 265, 268.

Also, the effect of the service of the attachment writ upon the Chase Bank was to forbid the Bank from paying over the attached accounts to anyone other than the Sheriff except by the Sheriff's direction or pursuant to an order of the New York Court. A payment in disregard of this prohibition is a violation of a lawful mandate of the New York Court, constituting a contempt of court punishable by imprisonment and a fine equal to the amount of the judgment with interest.

> *New York Civil Practice Act*, Sec. 917;
> *New York Judiciary Law*, Secs. 750, 753, 773;
> *Peo. ex rel. Cauffman* v. *Van Buren*, 136 N. Y. 252;
> *Clark* v. *Bininger*, 75 N. Y. 344;
> *Lowenthal* v. *Hodge*, 120 App. Div. (N. Y.) 304.

The injunction against payment by the Chase Bank to anyone other than the Sheriff who levied the attachment which is still outstanding, cannot, as a matter of law, be disobeyed.

> *U. S.* v. *United Mine Workers*, 330 U. S. 258;
> *Howat* v. *Kansas*, 258 U. S. 181;
> *Noble* v. *Union River Logging R. R.*, 137 U. S. 165;

Peo. ex rel. Davis & Palmer v. *Sturtevant*, 9 N. Y. 263;
Peo. ex rel. Cauffman v. *Van Buren, supra.*

Full faith and credit was required to be given by the District Court to petitioner's New York attachment.

Huron Holding Corporation v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193;
Sanders v. *Armour Fertilizer Works*, 292 U. S. 190;
American Surety Co. v. *Baldwin*, 287 U. S. 156, 166;
Steingut v. *National City Bank of New York*, 38 F. Supp. 451.

Furthermore, the Attorney General's action did not seek to enforce a personal liability, but merely sought a declaration that he is entitled to the Reichsbank's accounts, which declaration the New York Court in petitioner's attachment action will be bound to recognize in a proceeding to be instituted by the Attorney General in the New York Court. The declaratory judgment of the District Court nullifies the lien of petitioner's attachment and, if the New York Court is bound to recognize it, in effect disturbs the New York Court's control of the attached property. Thus, the Attorney General's action is a colorable attempt to oust the New York Court of its jurisdiction over the attached property.

In view of the foregoing the District Court should have declined to entertain this cause, particularly since the Attorney General, in seeking to obtain ultimate possession of the attached accounts free of the attachment lien, was given the right by Section 948 of the New York Civil Practice Act to invoke for that purpose the jurisdiction of the New York Court in the first instance and in such a proceeding the New York Court would have been bound to recognize the federal law.

CONCLUSION

Therefore, the questions herein are questions of general importance, and questions of substance relating to the administration of the United States freezing controls, and the Petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Trading with the Enemy Act, Section 7(b), 40 Stat. 417.

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] * * *. And provided further, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

2. Joint Resolution of May 7, 1940, 54 Stat. 179.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined

by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * * *

3. Excerpts from Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941 6 F. R. 2897 and Executive Order No. 8998, December 26, 1941 6 F. R. 6785.

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all trans-

fers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any, evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * *

SECTION 8. Section 5 (b) of the Act of October 6, 1917, as amended, provides in part:

"* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person may be imprisoned for not more than ten years, or both; and any officer, director, or agent, of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both."

4. New York Judiciary Law.

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

* * * * * * *

3. Wilful disobedience to its lawful mandate.

---

§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

* * * * * *

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

* * * * * *

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

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§ 773. If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

5. New York Civil Practice Act

§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publication pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

---

§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

---

§ 916. The attachment may also be levied upon:

* * * * * *

3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

---

§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; * * *

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

---

§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action

of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a

certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

---

§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or one or more of those forms of relief together or in the alternative.

---

§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

* * * * * *

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

6. Correspondence between Counsel for petitioner Zittman and the Sheriff of the City of New York

July 25, 1950

Sheriff of the City of New York,
Hall of Records,
New York, N. Y.

Attention: Mr. Posner

Dear Sir:

I am preparing a petition to the Supreme Court of the United States for a writ of certiorari. The case involves the attachment of blocked funds. I desire to place before the Supreme Court the following facts:

(1) The total number of closed cases in New York County in which the Sheriff levied upon blocked funds and the total sum of money paid out of blocked funds in such cases pursuant to post-judgment Treasury Department licenses.

(2) The total number of cases still pending in New York County in which the Sheriff has levied on blocked funds and the total amount still under attachment.

I shall appreciate it greatly if you will supply me with the mentioned facts.

Very truly yours,

JOSEPH M. COHEN

JMC:ah

Appendix.

CITY OF NEW YORK

OFFICE OF THE SHERIFF

Hall of Records
31 Chambers Street
New York 7, N. Y.

SIDNEY POSNER
Counsel

WOrth 2-4300

August 18, 1950

Joseph M. Cohen, Esq.
36 West 44th Street
New York, 18, N. Y.

Re: McGrath v. Chase National Bank et al.;
McGrath v. Federal Reserve Bank et al.

Dear Mr. Cohen:

In response to your letter of July 25, 1950 in which you requested certain information concerning the attachment of blocked funds, we caused an examination to be made of the records in the New York County division of the Sheriff's Office.

This examination disclosed the following facts:

(1) The Sheriff had attachment levies upon blocked funds in at least 63 cases which were subsequently closed by payments made pursuant to executions upon judgments or court orders. These payments amounting to $2,004,075.71, were authorized by Treasury Department licenses.

(2) There is now pending in New York County at least 49 cases in which, pursuant to warrants of attachment, the Sheriff has levied upon blocked funds or property in a reported amount of $16,548,382.26 which does not include certain securities and other property of an undetermined value.

Very truly yours,

SIDNEY POSNER
Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 314

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

No. 315

JOHN F. McCARTHY (with whom the Federal Reserve Bank of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER, JOHN F. McCARTHY

HENRY I. FILLMAN,
Counsel for Petitioner.

HENRY I. FILLMAN,
OTTO C. SOMMERICH,
of Counsel.

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I. Since, as a matter of law, petitioner had the right to commence his action against Reichsbank by levy of the attachment on its accounts with Chase and Federal Reserve, and since Executive Order No. 8389, as amended, as the Attorney General by the stipulations has here conceded, did not forbid suits by attachment of blocked assets, petitioner's attachment levied on January 21, 1942, on the accounts of Reichsbank with Chase and Federal Reserve was not forbidden by the Order, and, therefore, was valid	16

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II. Assuming, but without conceding, that the Executive Order lawfully forbade the commencement of suits by attachment of blocked assets unless authorized by the Secretary of the Treasury, nevertheless, the Secretary authorized commencement of suits by levy of attachments upon such assets, and such authorization was not limited by the proviso of General Ruling No. 12(4) issued subsequent to the attachment here involved 28

(a) *The Attorney General has conceded that attachments of blocked assets were authorized* 28

(b) *Assuming, but without conceding, that General Ruling No. 12, which came after petitioner's attachment, is relevant, nevertheless, Paragraph 3 thereof expressly confirms the validity of petitioner's attachment* 30

(c) *The Attorney General's contention that the authorization to institute suits by attachment of blocked assets was subject to paragraph 4 of General Ruling No. 12 is not borne out by the stipulations* 30

(d) *The statements contained in Press Release No. 34 and Public Circular No. 31, that paragraph (4) of General Ruling No. 12 is a formal statement of the position always taken by the Treasury with respect to attachments are erroneous in fact* 32

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(e) *The Attorney General's interpretation of paragraph (4) of General Ruling No. 12 is unintelligible* 38

(f) *Furthermore, General Ruling No. 12 has no relevancy here for it came after petitioner's attachment and was adopted in haste for the purpose of shaping the decision in Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332 39

III. *Propper* v. *Clark*, 337 U. S. 472, cannot be regarded as authority for the proposition that Executive Order No. 8389, as amended, forbade the commencement of actions against blocked nationals by attachment of their assets, particularly since the Attorney General has conceded that such attachments were authorized, but on the contrary this Court's decision in that case indicates that the Executive Order does not forbid such attachments. Furthermore, this Court's decision in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, which involved unauthorized transactions covered by the Order, has in effect approved *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, which held, as is conceded here, that the Order did not forbid the commencement of suits against blocked nationals by attachment of their blocked assets, for if the unauthorized transactions in *Singer* and *Mellie Iran* gave rise to enforceable rights, then, surely, petitioner's concededly authorized attachment here gave rise to an enforceable attachment lien 40

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IV. The District Court was required to give full faith and credit to petitioner's New York attachment and should have declined to entertain these causes, particularly since the Attorney General's petitions instituting these proceedings constitute a colorable attempt to meet federal jurisdictional requirements in order to oust the New York Court of its jurisdiction over the attached accounts. *Markham* v. *Allen*, 326 U. S. 490, is clearly distinguishable and does not avoid the impact of the requirement of full faith and credit to petitioner's attachment 47

V. Since a violation of the Executive Order is an offense under Section 5(b) of the Trading with the Enemy Act, subjecting the offender to a prison term and fine, the decrees of the District Court stamp the levies of petitioner's attachment as offenses under the Order, notwithstanding that (1) the wording of the Order does not plainly forbid suits by attachments of blocked assets and (2) petitioner's attachment was concededly authorized 57

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 314

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,[1]
Respondent.

No. 315

JOHN F. McCARTHY (with whom the Federal Reserve Bank of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER, JOHN F. McCARTHY

Opinions Below

The opinion of the District Court (R. 71) is reported in 82 F. Supp. 740.

The *per curiam* opinion of the Court of Appeals for the Second Circuit (R. 150) is reported in 182 F. (2d) 349.

[1] J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General.

That Court, on the authority of *Propper* v. *Clark*, 337 U. S. 472, unanimously affirmed two decrees of the District Court for the Southern District of New York, one in No. 314, and the other in No. 315.[2]

The decree of the District Court in No. 314 (R. 76, 77) declared and determined that (1) by Executive Order No. 8389, as amended, petitioner obtained no lien or other interest in the accounts of the Deutsche Reichsbank (hereinafter called "Reichsbank"), with The Chase National Bank of the City of New York (hereinafter called "Chase"), or in the funds represented thereby, as the result of the issuance and levy thereon of a warrant of attachment in an action instituted on January 21, 1942, by petitioner against Reichsbank in the New York Supreme Court, Kings County, which resulted in a judgment in petitioner's favor on April 24, 1942, and (2) by virtue of Vesting Order No. 7792, executed on October 3, 1946, the Attorney General, as successor in interest to the Alien Property Custodian, succeeded to the entire right, title and interest of the Reichsbank in said accounts, and by reason thereof is entitled against petitioner, the prior attaching creditor, to the entire balance remaining in these accounts as at the effective date of the Vesting Order.

The decree of the District Court in No. 315 (R. 145) declared and determined that by virtue of Vesting Order No. 7794 and a Turnover Directive of October 14, 1946, the Attorney General, as Successor to the Alien Property Custodian, became entitled to possession of certain debts

---

[2] Both causes were instituted by the Attorney General to test the validity of a New York attachment in a single action brought by petitioner against a non-resident blocked national and levied upon its accounts with two banks. One cause related to the accounts with one bank and the second cause related to the accounts with the other bank. In both Courts below the two causes were decided by a single opinion, although they were presented by separate records and briefs and resulted in separate decrees. The banks did not appeal from the District Court decrees. The records here in both causes have been combined.

or obligations owing to Reichsbank by the Federal Reserve Bank of New York (hereinafter called "Federal Reserve") as against petitioner, a prior attaching creditor, whose aforesaid attachment was levied upon the accounts of the Reichsbank with the Federal Reserve on January 21 1942.

Jurisdiction

The judgments of the Court of Appeals were entered on June 2, 1950 (R. 151, 152). Petitions for re-hearing were filed on June 16, 1950 and denied on June 27, 1950 (R. 153). The petitions for certiorari were filed September 19, 1950, and granted November 13, 1950. The jurisdiction of this Court is based upon Title 28, of the United States Code, Section 1254.

Questions Presented

The questions presented are:

First: Whether the commencement of petitioner's suit against Reichsbank in the New York Court and the levy of the warrant of attachment issued therein for jurisdictional purposes upon the blocked accounts of Reichsbank with Chase and Federal Reserve were forbidden by Executive Order No. 8389, as amended.

Second: Assuming, but without conceding, that by the words of Executive Order No. 8389, as amended, the commencement of suits by attachment of blocked assets was forbidden

> "unless authorized by the Secretary of the Treasury by means of regulations, rules, instructions, licenses, or otherwise" (the Order, Section 1),

whether the attachment for jurisdictional purposes of Reichsbank's blocked accounts with Chase and Federal

Reserve in aid of the New York action by petitioner, an American citizen, against Reichsbank, a non-resident blocked national, was authorized by the Secretary of the Treasury in view of the Attorney General's concession that the Secretary of the Treasury, in administering the freezing controls,

> "adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action" (R. 66, 135).

THIRD: Whether the claimed seizure of Reichsbank's accounts with Federal Reserve by Vesting Order No. 7794 and the Turnover-Directive was subject to the lien of petitioner's attachment.

FOURTH: Whether this case is controlled by *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, or by *Propper* v. *Clark*, 337 U. S. 472.

FIFTH: Whether the District Court was required to give full faith and credit to petitioner's New York attachment, and to decline to entertain these causes.

Statutes and Executive Order Involved

The pertinent statutes are the Trading with the Enemy Act, approved October 6, 1917, as amended, particularly Sections 5 (b) and 7 (b); the Joint Resolution of May 7, 1940, amending Section 5 (b) of the Trading with the Enemy Act and approving Executive Order No. 8389; The

New York Civil Practice Act, Sections 520, 645, 916, 917, 922, 948 and 969, and the New York Judiciary Law, Sections 750, 753 and 773.

The Executive Order involved is Executive Order No. 8389, as amended.

The relevant provisions of the statutes and Executive Order and regulations issued pursuant thereto are collected in the Appendix annexed hereto.

Statement

Prior to his death in August, 1939, Frank W. Mondell, a resident of the District of Columbia, and who was a member of the 54th (1895-1897) and 56th-67th (1899-1923) Congresses, majority floor leader in the 66th and 67th Congresses, and Director of the War Finance Corporation (1923-1925), performed certain legal services for, and at the special instance and request of, the Reichsbank (R. 40, 118), a German banking corporation not doing business in New York. His claim for compensation for such services was unpaid at the time of his death. His will was admitted to probate in the United States District Court for the District of Columbia, and letters of administration with the will annexed were duly issued and granted to William H. Mondell who, after qualifying as such administrator, duly assigned the decedent's claim against Reichsbank to the petitioner, a New York resident and citizen of the United States (R. 41, 118).

The Executive Order

When Germany invaded Norway and Denmark, the President invoked Sec. 5 (b) of the Trading with the Enemy Act and issued Executive Order No. 8389, freezing property in the United States belonging to Norway and Denmark and their nationals on or since April 8, 1940,

in order to assure that title in such property could not be acquired by Germany through the conquest of those countries. In Section 7 of the Order the President delegated to the Secretary of the Treasury the power to administer the freezing controls. By Congressional Joint Resolution enacted May 7, 1940, Sec. 5 (b) was amended to cover stocks and other securities by the insertion of provisions for regulation of dealings in "evidences of indebtedness or evidences of ownership of property", and the Executive Order and regulations and rulings issued thereunder were also approved and confirmed.

The purpose of the Joint Resolution is found in the following exchange which occurred on the floor of the Senate between Senator Connally and Senator Wagner, Chairman of the Committee on Banks and Currency, which had reported out the resolution (86 Cong. Rec. 5007):

> "Mr. Connally: And is not this measure for the purpose of *preventing change of title* of the property here in the United States by conquest, or by any other forceable or violent means?
>
> "Mr. Wagner: That is exactly the purpose." [Italics supplied.]

By the Joint Resolution it was also intended that United States citizens having claims against owners of blocked property would be protected by the freezing controls, as is apparent from the following statement of Senator Barkley (86 Cong. Rec. 5006):

> "It should also be stated—and I am sure the Senator [Wagner] omitted it by oversight—that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities, and other property in the United States, but it is also intended to protect American citizens in the event they have claims of any sort growing out

of these transactions, and we preserve the property not only for its owners but for the benefit of Americans who may have claims."

As Axis conquest progressed, Executive Order No. 8389 was extended to other countries, and on June 14, 1941, it was made applicable by Executive Order No. 8785 (6 F. R. 2897) to all other remaining continental countries, including Germany.

The Stipulation in Both Proceedings

The Executive Order, Section 1, forbade the transactions in blocked property therein specified unless

> "*authorized* by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, *or otherwise*, ..." [Italics supplied.]

Although the words of the Executive Order did not forbid the commencement of suits by United States citizens against blocked nationals, including German nationals, by attachment of their property within the Court's jurisdiction nevertheless, hundreds of applications were submitted to the Secretary by prospective litigants for authorization to attach blocked assets. Answering these requests, the Secretary ruled that a license was not required because the bringing of an action and the attachment therein of blocked property were not forbidden by the freezing controls but that, if the attaching creditor recovered a judgment against a blocked national, a license would be required before the attached blocked funds could be paid to satisfy the judgment.

The Attorney General has stipulated here (R. 64, 66-67, 133, 134-135) the following facts:

> "5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions

against funds belonging to blocked nations, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, *that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property* found within the jurisdiction of the court which issued the warrant *were not forbidden* but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. *A*

license to institute the action and levy the attachment was in fact not required by the Treasury Department.'' [Italics supplied.]

Petitioner's Action In the New York Court

On January 21, 1942, petitioner instituted an action against Reichsbank in the New York Supreme Court, Kings County, to recover $24,810.00 with interest thereon from May 30, 1939, for the legal services rendered Reichsbank by Frank W. Mondell. On the same day a warrant of attachment was duly issued out of the New York Court to the Sheriff of the City of New York, who levied upon the accounts of Reichsbank with Chase and Federal Reserve by serving on that day a certified copy of the warrant on Chase and Federal Reserve (R. 5, 85). Thereafter, the summons was served upon Richsbank by publication in accordance with the terms of an order of the New York Court and, as directed by said order, copies of the summons, complaint, the order for publication and notice to the defendant, were mailed to the Attorney General of the United States on behalf of Reichsbank, as then required in such case by Rule 50 of the New York Rules of Civil Practice. The Attorney General acknowledged receipt thereof (R. 42, 68, 120, 137). Neither Reichsbank nor the Attorney General appeared in the action or took any steps therein and on April 24, 1942, judgment was entered in petitioner's favor against Reichsbank for $29,660.21 (R. 42, 120).

Since the accounts levied upon were still "frozen", they were not turned over by Chase and Federal Reserve to the Sheriff to be applied in satisfaction of the judgment. From time to time the New York Supreme Court ordered the time extended within which the Sheriff might institute proceedings to reduce the attach accounts to his possession, and the orders of extension were duly served upon both banks (R. 28-29, 105). By reason thereof the accounts

continue under attachment (N. Y. Civil Practice Act, Sec. 922). The warrant of attachment is still outstanding and has never been vacated or modified nor has it been released or discharged or annulled (R. 29, 105).

The Subsequent Vesting

Some four and one-half years thereafter, and on October 3, 1946, the Alien Property Custodian executed Vesting Order No. 7792, purporting to vest the debts or other obligations owing Reichsbank by Chase arising out of dollar checking accounts maintained by Reichsbank with Chase, including any and all rights to receive, demand, enforce and collect the same (R. 9). By letter of November 26, 1946, the Office of Alien Property, Department of Justice, as Successor to the Alien Property Custodian, directed Chase to forward checks for the amounts represented by the accounts to his office (R. 9, 13). Chase refused to comply with this direction until the Sheriff released the warrant of attachment (R. 18, 20).

By Vesting Order 7794 executed on October 3, 1946 (R. 88), the Alien Property Custodian vested the account maintained by Reichsbank with Federal Reserve and implemented this Vesting Order by a Turnover-Directive (R. 93) addressed to Federal Reserve, issued on October 14, 1946. Federal Reserve complied with the Custodian's Turnover-Directive to the extent of remitting a portion of the account but retained the balance of the Reichsbank's account on the ground that it was required to do so by the attachment which had been served upon it (R. 97).

Thus, the Alien Property Custodian vested the entire *corpus* represented by the Reichsbank's account with Federal Reserve, whereas he vested the "right, title and interest" of Reichsbank in the accounts with Chase and committed to judicial determination the *quantum* of the property acquired.

The Institution of These Proceedings

Some fourteen months after the execution of the vesting orders, and on January 23, 1948, the Attorney General, as successor to the Alien Property Custodian, instituted two proceedings in the District Court by petition and order to show cause, directed to the Chase in one proceeding and to Federal Reserve in the other, and in both proceedings petitioner, the Sheriff of the City of New York and Zittman, another attaching creditor of Reichsbank, were made parties.

As against your petitioner the Attorney General sought in the Chase proceeding a decree declaring (1) that by virtue of Executive Order No. 8389, as amended, petitioner and the Sheriff obtain no lien or other interest in the Reichsbank accounts with Chase, which had been attached by petitioner in his New York action, and (2) that by virtue of the Vesting Order the Attorney General is entitled to these accounts (R. 7), whereas in the Federal Reserve proceeding he sought a declaration that by virtue of the Vesting Order and the Turnover Directive, he is entitled, notwithstanding petitioner's attachment, to possession of the Reichsbank accounts with Federal Reserve (R. 86).

In his brief in the District Court the Attorney General took the position that he was "requesting only a declaration of rights"; that he "does not seek an order * * * directing that the funds be surrendered to him"; and that "the nature of the judgment requested will interfere with possession of the State Court under the writs of attachment only to the extent that in later appropriate proceedings the State Court will be bound to recognize the rights adjudicated here."

Although the District Court found (R. 74) "that the Treasury Department advised prospective litigants that no license was necessary to bring suit and secure the issuance of a warrant of attachment", nevertheless, the Court

considered itself "bound" by the decision of the Court of Appeals for the Second Circuit in *Clark* v. *Propper*, 169 F. (2d) 324, "which expressly disagreed with the decision in *Singer v. Yokohama Specie Bank*, 293 N. Y. 542," and granted the relief sought by the Attorney General.

The Court of Appeals for the Second Circuit affirmed the decrees of the District Court solely "on the authority of *Propper* v. *Clark*, 337 U. S. 472." Three days after the affirmance and on June 5th, 1950, this Court decided *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841. Petitioner, by petition for rehearing, called the attention of the Court of Appeals to the conflict between its decision here and the *Singer* and *Banque Mellie Iran* decision of this Court, but the Court of Appeals denied rehearing without opinion.

Specification of Errors

The United States Court of Appeals erred:

FIRST: In deciding that petitioner's attachment was forbidden by Executive Order No. 8389, as amended, and, therefore, invalid.

SECOND: In refusing to hold that petitioner's attachment was authorized by the Secretary of the Treasury and, therefore, valid.

THIRD: In refusing to hold that the lien of the levy of petitioner's attachment upon the accounts of Reichsbank with Federal Reserve was not affected by the claimed seizure of these accounts by Vesting Order No. 7794 and the Turnover Directive of October 14, 1946.

FOURTH: In deciding that these cases are controlled by *Propper* v. *Clark*, 337 U. S. 472.

FIFTH: In refusing to hold that the District Court should have given full faith and credit to petitioner's attachment and should have declined to entertain these causes.

SIXTH: In affirming the decree of the District Court in the Chase case and refusing to reverse such decree and direct dismissal of the Attorney General's petition.

SEVENTH: In affirming the decree of the District Court in the Federal Reserve case and refusing to reverse such decree and direct dismissal of the Attorney General's petition or at least modifying the decree by providing that the claimed seizure by Vesting Order No. 7794 and the Turnover-Directive was subject to the lien of petitioner's attachment.

Summary of Argument

I. Petitioner, as a matter of law, had the right to commence his action against Reichsbank by levy of the attachment on its accounts with Chase and Federal Reserve. The words of Executive Order No. 8389 do not forbid the commencement of suits by United States citizens in United States courts against non-resident blocked nationals by attachment of their property within the courts' jurisdiction. That the Executive Order did not forbid the commencement of suits against blocked nationals by levy of a warrant of attachment was decided by New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, and by the Federal District Court in *Sun Insurance Office Limited* v. *Arauca Fund*, 84 F. Supp. 516 (S. D. Fla., Miami Div.).

Apart from the foregoing, the Attorney General has conceded here that the Executive Order does not forbid the commencement of suits by attachment of blocked assets for he stipulated (R. 66, 135) that from the inception of

the freezing controls

> "the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment rendered in such action"

and that a license to institute the action and levy the attachment was

> "not required by the Treasury Department".

Therefore, petitioner's attachment on January 21, 1942, on the accounts of Reichsbank with Chase and Federal Reserve was not forbidden by the Executive Order and was valid.

II. Since the Executive Order provides in Section 1 thereof that the transactions therein specified are forbidden unless "authorized" by the Secretary of the Treasury "by means of regulations, rulings, instructions, licenses, *or otherwise*, * * *", the Secretary of the Treasury was given the right to permit a transaction covered by the Order in any manner he saw fit, and a "license" is merely one of the many methods by which the Secretary can *authorize* a transaction covered by the order. Assuming, but without conceding, that the words of the Executive Order lawfully forbade the commencement of suits of blocked assets unless "authorized" by the Secretary of the Treasury in any manner he saw fit, nevertheless, the Secretary did authorize commencement of suits by levy of attachment upon blocked assets, and this was con-

ceded by the Government of the United States in its brief *amicus curiae* submitted to the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, wherein the Government set forth the advice to prospective litigants quoted in paragraph 5 of the stipulations here (R. 65-66, 134-135) and then went on to state that from the terms thereof "it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action." Petitioner's attachment, concededly authorized, was not subject to the proviso of General Ruling No. 12 (4) which was promulgated on April 21, 1942, exactly three months after the levy of petitioner's attachment on the accounts with the two banks but, on the contrary, its validity was expressly confirmed by paragraph 3 of the General Ruling.

III. *Propper* v. *Clark*, 337 U. S. 472, which held that the Executive Order merely directed against "shifts in title to blocked assets" is not authority for the proposition that the Executive Order forbade the commencement of actions by attachment of blocked assets, particularly in view of the Attorney General's concession here that such attachments were authorized, but, on the contrary, that decision indicates (p. 488 of the Report) that the Executive Order does not forbid such attachments for the reason that an attachment is not a "seizure of title".

Furthermore, this Court's decision in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, which clearly involved unauthorized transactions covered by the Order, has, in effect, approved *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, for if the unauthorized transactions in *Singer* and *Mellie Iran* gave rise to enforceable rights, then, surely, petitioner's concededly authorized attachment here gave rise to an enforceable attachment lien.

IV. The District Court was required to give full faith and credit to petitioner's New York attachment and should

have declined to entertain these causes, particularly since the proceedings of the Attorney General, which sought and resulted in decrees invalidating the lien of petitioner's attachment, constitute a colorable attempt to meet federal jurisdictional requirements in order to oust the New York Court of its jurisdiction over the attached accounts. *Markham* v. *Allen*, 326 U. S. 490, is clearly distinguishable and does not avoid the impact of the requirement of full faith and credit to petitioner's attachment.

V. Since a violation of the Executive Order is an offense under Section 5 (b) of the Trading with the Eenemy Act, subjecting the offender to a prison term and fine, the decrees of the District Court stamp the levies of petitioner's attachment as offenses under the order, notwithstanding that (1) the wording of the Order does not plainly forbid suits by attachments of blocked assets and (2) petitioner's attachment was concededly authorized.

ARGUMENT

I

Since, as a matter of law, petitioner had the right to commence his action against Reichsbank by levy of the attachment on its accounts with Chase and Federal Reserve, and since Executive Order No. 8389, as amended, as the Attorney General by the stipulations has here conceded, did not forbid suits by attachment of blocked assets, petitioner's attachment levied on January 21, 1942, on the accounts of Reichsbank with Chase and Federal Reserve was not forbidden by the Order, and, therefore, was valid.

As a matter of law, petitioner could sue Reichsbank in the New York courts on January 21, 1942, when the United States was at war with Germany, though Reichsbank could not sue in our courts.

McVeigh v. *United States*, 11 Wall. 259;
University v. *Finch*, 18 Wall. 106;
Porter v. *Freudenberg* [1915], 1 K. B. 856.

In *University* v. *Finch*, *supra*, the Court said (p. 111):

> "The case of *McVeigh* v. *United States* holds that an alien enemy may be sued though he may not have a right to bring suits in our courts."

McVeigh v. *United States* was followed in *Porter* v. *Freudenberg*, *supra*, at page 882. Lord Justice Reading, writing for the Court, expressed the common law rule as follows (p. 880):

> "The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Baillache, J. in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim*, 'To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule.' In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects."

The Congress recognized the common law right to bring suit in the courts of the United States against alien enemies by expressly providing in Section 7(b) of the Trading with the Enemy Act [40 Stat. at p. 417], as follows:

> "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or

> ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] * * *. And provided further, That an enemy or ally of enemy may defend by counsel *any suit* in equity or action at law *which may be brought against him.*" (Italics supplied.)

Here, since Reichsbank, an alien enemy, is a German corporation and a non-resident of New York, personal service on it in the State of New York in order to give the New York court jurisdiction of petitioner's action could not have been made. Therefore, petitioner's action could only have been brought upon substituted service of process by publication. But such substituted service is only effectual where a warrant of attachment has previously issued and a levy made on property of the defendant in the State.

> *Pennoyer* v. *Neff*, 95 U. S. 714;
> *Helme* v. *Buckelew*, 229 N. Y. 373;
> *Dimmerling* v. *Andrews*, 236 N. Y. 43;
> *McCarthy* v. *Culkin*, 254 N. Y. 328;
> *Schram* v. *Keane*, 279 N. Y. 227, 233-234.

In *Dimmerling* v. *Andrews*, *supra*, the headnote states:

> "No order of publication of the summons in an action to recover a sum of money only against a non-resident may now be made except upon proof that his property within this state has been seized. (Civ. Pr. Act. §§. 232, 493.) An order of publication obtained against non-residents * * * and subsequent proceedings based thereon are without jurisdiction where the papers upon which the order was based did not show that any warrant of attachment had been levied upon their property."

Manifestly, unless Reichsbank's accounts with Chase and Federal Reserve were attached and proof thereof made when petitioner applied to the New York Supreme Court

for an order of substituted service by publication, jurisdiction of Reichsbank or of its property could not have been acquired by the New York court, with the result that petitioner could not have maintained his action. Control by the New York court of the *res* in the State was the foundation of jurisdiction of petitioner's action, and that jurisdiction, if obtained at all, could only have been obtained by the levy of a warrant of attachment upon Reichsbank's accounts with Chase and Federal Reserve.

Since petitioner, as a matter of law, had the right to sue Reichsbank, and since it was essential that petitioner obtain a warrant of attachment on property of Reichsbank in New York in order to give the New York court jurisdiction, it follows that petitioner had the right to institute his action on January 21, 1942, by the levy of the attachment warrant upon Reichsbank's accounts with Chase and Federal Reserve.

In *Watts, Watts & Co., Ltd.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, jurisdiction was obtained by attachment on August 24, 1914 in a libel *in personam*, brought by a British corporation against an Austro-Hungarian corporation. This Court granted a writ of certiorari which was filed July 21, 1916, from an affirmance by the Circuit Court of Appeals of a decree of dismissal of the District Court. On December 7, 1917, the President proclaimed a state of war between the United States and Austria-Hungary. On April 17, 1918, the cause was argued before this Court. Mr. Justice Brandeis held, pages 21-22:

> "A suit may be brought in our courts against an alien enemy. McVeigh v. United States, 11 Wall. 259, 267, 20 L. Ed. 80. See also Dorsey v. Kyle, 30 Md. 512. If the libel had been filed under existing circumstances, security for the claim being obtained by attachment, probably no American Court would, in the exercise of discretion, dismiss it and thus deprive

the libelant not only of its security, but perhaps of all possibility of ever obtaining satisfaction."

In *Hepburn's Case*, 3 Bland (Md.) 95, the Court said, at pages 120, 121:

"There can be no doubt, that Hepburn may have proceeded by attachment at any time during peace; but it is said, that the revolutionary war had commenced before this debt became due; and, that, from the 4th of July, 1776, to the peace of 1783, the Mollisons were alien enemies. * * * The only reason why a non-resident alien enemy is not allowed to sue is, that he should not be permitted to recover property and take it out of the country, so as thereby to strengthen the enemy. Vattel, b. 3, section 77; Clarke v. Morey, 10 John. Rep. 70; Buchanan v. Curry, 19 John. Rep. 137.

" 'But this reason in no way applies to the case of a citizen creditor, suing by attachment to obtain satisfaction from a non-resident alien enemy debtor. In such case, our own citizen by making the property so available to the satisfaction of his own debt, does so far strengthen our own country at the expense of the enemy.'

* * *

" 'It is clear then, upon principle, that there was nothing in the circumstances in the Mollisons having been non-resident alien enemies by which the remedy of their creditor Hepburn could have been in any degree affected. Hepburn might have proceeded by attachment at any time after his debt became due on the first of April, 1776, except within that short period during which, by the course of the revolution, the courts of justice were closed; and which it was declared should not be considered as a part of the time limited for bringing any action.' "

In *Dorsey* v. *Kyle*, 30 Md. 512, the Court, at page 520, said:

> "And if a party, though an alien enemy, be suable at all, it is difficult to suggest a good reason why the same proceedings cannot be had by his creditors against his property remaining within the jurisdiction of the State, that can be taken against the property of any other non-resident debtor whatever. His being an alien enemy does not make him the less a non-resident debtor. The right of his creditors to proceed by attachment was not suspended because he thought proper to assume the position of an alien enemy. All the remedies provided by law against the property of an absent or non-resident debtor, remained open to them; and if they have pursued those remedies in the mode prescribed by law, the debtor himself can make no question of their right so to do, upon the ground that he no longer remained in amity with them or their government."

In *Mixer* v. *Sibley*, 53 Ill. 61, it was held, that proceedings by attachment, in 1862, for the collection of a debt on the part of a creditor residing in Illinois against a defendant residing in Alabama, a State then in rebellion against the United States, notice of the pendency of the suit having been given by publication which resulted in a judgment against defendant and sale of the property attached, were not void by virtue of a Presidential proclamation issued August 16, 1861, pursuant to the Act of Congress of July 12, 1861, empowering the President to prohibit by proclamation all commercial intercourse between the rebellious and the loyal states. The Court said, at page 70:

> "* * * No authority has been, or can be shown, that the right to the writ was taken away by the rebellion, or by act of congress, or by the President's proclamation consequent thereupon. Such was not the ob-

ject of either. Neither was designed to deprive creditors in the adhering States, from the use of all such remedies for the collection of their debts, as the laws of those States gave them."

It is plain that the words of Executive Order No. 8389, made applicable to Germany in peacetime on June 14, 1941, do not forbid the commencement of suits by United States citizens in United States courts against non-resident German nationals by attachment of their property within the courts' jurisdiction. It cannot be said, from the language used in the Order, that the President made his position in this respect self-evident. His failure to express clearly an intention to forbid suits by attachment of blocked assets is emphasized by the language used in other proclamations or Executive Orders to prohibit attachments. Thus, for example, the President inserted in the proclamation dated December 26, 1917, which took over the control of the railroads, a provision that

> "Except with the prior written assent of said director, no attachment by mesne process * * * shall be levied on"

the property of the railroads used in their business as common carriers. (See, *Dooley* v. *Pennsylvania R. Co.*, 250 Fed. 142, 143.)

More recently, President Truman's Executive Order 10155 of August 25, 1950 (15 F. R. 5785, 5787), providing for taking over the railroads and for their operation by the Secretary of the Army in the name of the United States Government provides in part as follows:

> "8. Except with the prior written consent of the Secretary * * * no attachment by mesne process, garnishment, execution or otherwise shall be levied on or against any of the real or personal property or other assets of any such carrier; * * *."

The very definiteness with which an attachment was forbidden in these Presidential Orders and the absence of such a prohibition in Executive Order No. 8389 leads a reasonable person to believe that the President did not intend by the freezing Order to prohibit suits by attachment of frozen assets.

As stated by Judge Learned Hand in *United States* v. *Leiner*, 143 F. (2d) 298, 300:

> "The 'Freezing Order' covered only—(A and B)—transfers or payments between banks—(C)—'transactions in foreign exchange'—(D)—the withdrawal of 'earmarking'—of bullion, currency and the like—and —(E)—the transfer of stocks and bonds."

That the Executive Order did not forbid the commencement of suits against blocked nationals by levy of a warrant of attachment was decided by the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumanici*, 288 N. Y. 332, and by the Federal District Court in *Sun Insurance Office, Limited* v. *Arauca Fund*, 84 F. Supp. 516 (S. D. Fla., Miami Div.).

In *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei, supra*, a Delaware non-profit corporation commenced an action by attachment of defendant's accounts with New York banks. The defendant appeared specially to contest jurisdiction upon the ground (288 N. Y. 337) that Executive Order No. 8389 "so far immobilized its deposit accounts * * * as to render them wholly unattachable in the absence of a lifting license of the Secretary of the Treasury." The United States submitted to the Court a brief *amicus curiae* in which was made the same concession of fact as is set forth in paragraph 5 of the stipulations of fact in the instant causes, and the further concession (p. 39 of the Government's brief in that case) that

> "From the terms of the stipulation, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action."

In sustaining the validity of the attachment the New York Court of Appeals held (p. 338)[3]:

> "The Executive Order did not forbid attachment of the conceded interest on the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff. (Cf. *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, 200.) The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction *in rem* over the deposits in question.
>
> * * *
>
> As *amicus curiae*, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. (See *United States* v. *Pink*, 315 U. S. 203.)"

In *Sun Insurance Office, Limited* v. *Arauca Fund, supra,* the libelant filed on July 11, 1941, a libel *in personam* with clause of general attachment in a cause of general average against a German steamship company. On July 12, 1941, when the Executive Order was in force with respect to

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[3] Referring to the *Polish Relief* case, Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 stated that (p. 402) the New York Court of Appeals "got off to a good start in the Polish Relief case" and that (p. 403, footnote 30): "The plaintiff had received no license, *but none was required to commence an action.* Brief for United States in the *Polish Relief* case, *supra*, Note 2, pp. 39-42. Payment from the blocked accounts, even to the Sheriff, could not be made without Treasury authorization, however, as the court recognized." (Italics supplied).

German property, the S. S. "Arauca", belonging to the German company, then in Port Everglades, Florida, was attached. As found by the Court (p. 518), the libelant "did not apply for or procure a license under the said Executive Order authorizing the attachment of the 'Arauca'." On July 28, 1941, the United States Maritime Commission requisitioned the ship and deposited with the Treasurer of the United States a sum on account of just compensation for the vessel's requisition. On October 28, 1942, the Alien Property Custodian vested all property of or owing to the German company in an action *in rem* by the libelant against the deposited fund. The Attorney General, as successor to the Alien Property Custodian, appeared as claimant and contended that the libelant did not have a valid attachment lien on the vessel because a license under the Executive Order had not been applied for or procured authorizing the attachment. Judge Holland, after stating in his opinion (p. 517) that the case was "argued and submitted on written briefs by the advocates of the respective parties" and that the Court was "fully advised and satisfied in the premises", held, as a matter of law, that (pp. 518-519):

> "On the date of the acquisition of the 'Arauca' by the United States Maritime Commission, July 28, 1941, the libelant herein had a valid attachment lien on the vessel by virtue of its attachment of July 12, 1941, notwithstanding the fact that no license authorizing said attachment was secured from the Secretary of the Treasury under the provisions of Executive Order 8389. No license or permit under said Executive Order was required to validate libelant's attachment lien."

That there is no conflict between petitioner's New York attachment action and the freezing Order is clear from Mr. Justice Coleman's opinion in *Metallo-Chemical Corp.*

v. *Banque Transatlantique S. A.*, 67 N. Y. Supp. (2d) 186* (not officially reported) in which he said, at pages 188-189:

> "These requirements were in no way suspended by the Executive Order, nor, as Commission for Polish Relief v. Banca Nationala a Rumaniei, 288 N. Y. 332, 43 N. E. 2d 345, makes plain, is there any necessary conflict between the Order and the New York statutes. Proceeding under both all steps under an attachment may be taken except one; the only restraint upon the bank was that it could not pay over to the Sheriff a debt which was in a 'blocked account.' * * *
>
> The plaintiff was not required to sue when the bank failed to pay over. But it was required to keep the attachment alive for jurisdictional purposes, Civil Practice Act, § 922, either by suing or by having its time to do so extended until the freezing restrictions had been removed, or a license to pay over granted. If the plaintiff, with the Order still in effect, had sued the bank, the latter might have justified its refusal to pay by referring to the lack of power to do so; if judgment had gone against it, it might again rely on the Order to stay its enforcement, where as here, it admits its indebtedness to the defendant. Or it might even have been required to pay over the blocked account to the Sheriff 'to the credit of this action' to await the event and the further order of the court. 288 N. Y. 332, 338, 43 N. E. 2d 345, 347; Civil Practice Act, § 940. But whatever the outcome of an action against the Bank in aid of the attachment, the matter would remain in *statu quo* within the limitations imposed by the Order. *The plaintiff would be free to proceed to judgment in the principal case, but*

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* The Attorney General conceded in the stipulations (R. 66, 135) that the Treasury subsequently issued a license, attached to the stipulations as Exhibit B (R. 69, 138) authorizing the payment of the judgment recovered by the plaintiff in that action.

there would be no payment until the Government released its hand. Our courts will determine whether the plaintiff should succeed and whether it has proceeded in a manner that would entitle it to the benefits of an attaching creditor; the Government will not interfere with that judgment but will not permit the plaintiff to collect the amount awarded until it first decides that the receipt of the money by the plaintiff will not offend the objectives of the Order and of the Trading with the Enemy Act. Thus the two provisions, state and federal, conjoin to declare the plaintiff's right, and there is no conflict between them." (Italics supplied.)

But, apart from the foregoing, the Attorney General has conceded here that the Executive Order does not forbid the commencement of suits by attachment of blocked assets, for he stipulated (R. 66, 135) that the Secretary of the Treasury adopted the position, in response to numerous requests, that the bringing of an attachment action and the levy of an attachment upon blocked property

> "were not forbidden"

and that a license

> "to institute the action and levy the attachment was in fact not required by the Treasury Department."

Furthermore, the Attorney General in his brief below in the Court of Appeals, at page 24, stated:

> "Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated."

Both the stipulation and this concession are decisive of this case.

II

Assuming, but without conceding, that the Executive Order lawfully forbade the commencement of suits by attachment of blocked assets unless authorized by the Secretary of the Treasury, nevertheless, the Secretary authorized commencement of suits by levy of attachments upon such assets, and such authorization was not limited by the proviso of General Ruling No. 12(4) issued subsequent to the attachment here involved.

(a) *The Attorney General has conceded that attachments of blocked assets were authorized.*

The Executive Order provides in Section 1 that the transactions therein specified are forbidden unless

> "*authorized* by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, *or otherwise,* * * *." (Italics supplied.)

The word "authorized" means, when considered with the context, "permitted", and its use in this context reserved to the Secretary of the Treasury the right to permit a transaction covered by the order by means of regulations, or rulings, or instructions, or licenses, "or otherwise." In other words, the Secretary was given the right to permit a transaction in any manner he saw fit.

It is apparent from the quoted language of the Order that great confusion is introduced if one speaks of a "license" under the Order, which is not what the Order speaks of, and does not reserve the word "license" for one of the many methods by which the Secretary can *authorize* a transaction covered by the Order. What the Order says is that any one who does what the Order forbids will be committing a criminal offense, but if the Sec-

retary of the Treasury *authorizes* what is done, he is not committing a criminal offense at all.

The Attorney General has conceded by the stipulations (R. 65, 66, 134, 135) that from the inception of "freezing" controls all litigants who proposed to sue by attachment of blocked assets, and had requested the Secretary to authorize an attachment or levy by a license, were advised as follows:

> "Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national."

This amounted to an authority to all plaintiff litigants, including petitioner, to bring suit by attachment of blocked assets. In other words, it is an authorization given pursuant to the proviso to Executive Order 8389.

It was so recognized by the Government of the United States in its brief *amicus curiae* submitted to the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, for at page 39 of the brief the Government set forth the advice to prospective litigants quoted above and then went on to state:

> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action."

The legal result of this authorization of the Secretary is that not only were all litigants, including petitioner, permitted to bring suit by attachment of blocked assets, but that the attachment itself is to be regarded as valid. To hold otherwise would be to maintain a proposition repugnant to national good faith, for to say that a person is authorized to commence a suit by attachment of blocked assets, and yet to hold that where he has done so, he has in effect committed a crime, would be to convert the authorization into an instrument of deception and fraud.

(b) *Assuming, but without conceding, that General Ruling No. 12, which came after petitioner's attachment, is relevant, nevertheless, Paragraph 3 thereof expressly confirms the validity of petitioner's attachment.*

Paragraph 3 of General Ruling No. 12, specifically provides that a license "or other authorization" issued by the Secretary of the Treasury before, during, or after a transfer "shall validate such transfer" or render it "enforceable to the same extent as it would be valid or enforceable but for * * * Section 5(b) of the Trading with the Enemy Act" and Executive Order 8389 and the regulations thereunder.

Since the Attorney General has conceded here that petitioner's attachment was authorized by the Secretary, the validity of petitioner's attachment and the levies thereof on Reichsbank's accounts is expressly confirmed by the General Ruling.

(c) *The Attorney General's contention that the authorization to institute suits by attachment of blocked assets was subject to paragraph 4 of General Ruling No. 12 is not borne out by the stipulations.*

In seeking to overcome the consequences flowing from the concession that a license was not required to institute suit against owners of blocked assets by attachment and that the Secretary of the Treasury authorized such suits,

the Attorney General has taken the position that the authorization to institute suit by attachment was limited, because it was subject to the conditions set forth in the proviso of paragraph (4) of General Ruling No. 12 issued on April 21, 1942 providing that while a transfer of blocked property "shall, so far as affected by the Order and/or this General Ruling, be valid and enforceable" for the purpose of determining for the parties to the action or the proceeding the rights and liabilities therein litigated, no attachment, judgment or other judicial process shall confer any greater right, power, or privilege with respect to, or interest in, any blocked property than the owner of such property could create by voluntary act prior to the issuance of a license.

However, the Attorney General, in taking this position, manifestly overlooks that the stipulations here do not contain the language found in the proviso of paragraph (4) of the General Ruling or any similar language, and do not set forth any conditions to which the authorization to attach blocked assets was subject, other than the requirement that a license be secured before payment could be made from the blocked account to satisfy any judgment recovered in the attachment action. This is apparent from the following statement, at page 6 of the Attorney General's brief in opposition to the petitions for writ of certiorari herein:

> "It was stipulated by the parties that the Treasury Department, in administering the freezing controls, advised persons who made inquiry concerning the possibility of securing adjudication of their rights *vis-a-vis* owners of blocked property, that *the regulations did not in any way forbid* the bringing of suits in the courts or the resort to judicial process (*including writs of attachment*), but that a license was required before a judgment obtained in any suit could be satisfied out of blocked property." [Italics supplied.]

Since the stipulations state the position of the Treasury Department and do not contain the conditions set forth in the proviso of paragraph (4) of the General Ruling or any language similar thereto, it is apparent that the institution of suit by attachment of blocked assets was not made subject to the conditions contained in the proviso of paragraph (4) of the General Ruling.

(d) *The statements contained in Press Release No. 34 and Public Circular No. 31, that paragraph (4) of General Ruling No. 12 is a formal statement of the position always taken by the Treasury with respect to attachments are erroneous in fact.*

The Attorney General has taken the position (p. 23 of his brief in opposition to the petitions for certiorari herein) that "every public pronouncement which the Treasury has made on the subject emphasizes that interests in blocked property may *not* be transferred by means of attachments unless a license is granted" and refers to Press Release No. 34 issued by the Treasury Department on April 21, 1942 and Public Circular No. 31 issued August 2, 1946 in support of his contention. Both the Press Release and the Public Circular contain a statement that paragraph (4) of General Ruling No. 12 is a "formal statement of the position which the Treasury Department has always taken" with respect to litigation, including attachments, affecting blocked assets.

Not only is this contention not borne out by the stipulations in these causes, but, it is erroneous in fact, for the position of the Treasury Department with respect to litigation, including attachments, affecting blocked property, was not "always" as stated in the General Ruling.

In *Werfel* v. *Zivnostenska Banka,* 174 Misc. 67, rev'd. 260 App. Div. 747, rev'd. 287 N. Y. 91, the following appears at page 40 in the appellant's brief in the New York

Court of Appeals:

"We submit herewith copy of a ruling received by us from the Treasury Department in reply to our question as to how an Executive Order may affect a suit against a national of one of the countries affected thereby and the attachment of moneys already 'frozen' by the Executive Order.

'Treasury Department

Washington

June 7, 1940

Dear Sirs:

Reference is made to your letter of June 3, 1940, addressed to the Department of State, a copy of which you sent to this Department.

Enclosed for your information are copies of Executive Order No. 8405 of May 10, 1940, and the Regulations of the same date issued thereunder. Under such Order and Regulations no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

Very truly yours,

(signed) D. W. Bell,
Acting Secretary of the Treasury.

Moss, Marcus & Gardner,
36 West 44th Street,
New York, New York.
Enclosures.' "

It is manifest that the authorization to bring suit by attachment set forth in Mr. Bell's letter was not made subject to the conditions contained in the proviso of paragraph (4) of the General Ruling.

In *Murray Oil Products Co.* v. *Mitsui & Co., Ltd.*, 55 F. Supp. 353 (S. D. N. Y.) aff'd 146 F. (2d) 381 (C. C. A. 2), it appeared that the New York office of the defendant, a Japanese corporation, was taken over after Pearl Harbor by the United States Treasury Department on December 8, 1941, and placed in liquidation under the supervision of that department until on or about August 17, 1942, when the Alien Property Custodian vested title to all property and assets of the defendant in the United States. Meanwhile and on December 17, 1941, plaintiff commenced an action against the defendant in the New York Supreme Court, in which action a warrant of attachment was issued to the Sheriff of the County of New York who, on December 23, 1941, attached the defendant's bank balances with the National City Bank and Chase National Bank in New York City. The action was thereafter removed to the Southern District. As appears in the supplemental affidavit of Copal Mintz, plaintiff's attorney, sworn to April 3, 1944 (p. 26 of the Record on Appeal to the Court of Appeals for the Second Circuit in that case), at the time of the levy "the Sheriff was informed * * * that the attached sums would be held subject to Executive Order 8389 popularly known as the 'freezing' order.", and that, in view of the circumstances, Mr. Mintz "perceived no necessity of having the attached amount physically turned over to the Sheriff in advance of the judgment in the action, and, therefore, made no application for the necessary license and took no steps to compel the turning over of the funds to the Sheriff."

The following also appears in Mr. Mintz's supplemental affidavit (p. 28 of the Record on Appeal):

> "On March 18, 1942, I addressed a letter to the Treasury Department, Alien Property Custodian and

the Department of Justice, in which I called attention to the commencement and pendency of the action and the steps taken therein up to that time. Among other things I inquired, in that letter: 'Is there any objection on the part of the Department of Justice, Treasury Department, Alien Property Custodian, or any other agency of the government to the prosecution of the action, during the pendency of the war?' I received replies from each of the Departments. The Department of Justice interposed no objections. The Treasury Department, in a letter dated April 17, 1942, signed by J. W. Pehle, Assistant to the Secretary, specifically stated 'The Treasury Department will interpose no objection * * *.' The Alien Property Custodian, in a letter dated April 28, 1942, signed by A. Matt Werner, General Counsel, said:

* * *

'You are no doubt familiar with provisions of Executive Order No. 8389 of April 10, 1940, as amended, popularly known as the freezing order, which was issued under provisions of Section 5(b) of the Trading with the Enemy Act, as amended. This Executive Order prohibits, except under license, certain transactions on behalf of nations of designated countries, including Japan, as well as transactions involving property in which such nationals have an interest. It is suggested that you apply to the Federal Reserve Bank of New York for information regarding the application of provisions of this Executive Order to the satisfaction of a claim of your client or of a judgment rendered in its favor out of assets belonging to Mitsui & Co., Ltd. which are now frozen.'"

Thus, it is apparent that as late as April 17, 1942, some two months after petitioner's attachment here, and prior

to the issuance of General Ruling No. 12 on April 21, 1942, the Treasury Department, which then had a proprietary interest as liquidator of Mitsui & Co., Ltd., advised the attaching creditor's attorney that the attachment suit could be prosecuted after December 7, 1941, and did not advise him that his attachment was subject to the conditions found in paragraph (4) of General Ruling No. 12. It is also manifest that the general counsel to the Alien Property Custodian, on April 28, 1942, did not lay down in his letter to the plaintiff's attorney in that case any conditions such as are contained in paragraph (4) of the General Ruling to the prosecution of the attachment action in that case.

The District Court, in that case, in granting judgment in plaintiff's favor, long after the Alien Property Custodian had vested the attached accounts, said, at page 356:

> "The entry of judgment will, of course, terminate the action, but the vacature of the warrant of attachment cannot properly be disposed of now. Ordinarily the judgment would be satisfied in whole or in part out of the monies attached, but, it appears, they have passed into the possession of the Alien Property Custodian. It is conceded that it will be necessary for the plaintiff to file a claim with him. The judgment will be evidence of the debt.
>
> It may be that the Alien Property Custodian has sufficient assets in his possession to satisfy all of the creditors of Mitsui & Co., Ltd., in full. On the other hand the liabilities of the defendant, at least the claims which have been or may be filed with the Alien Property Custodian, may exceed the assets in his possession.
>
> The plaintiff should be entitled to litigate any right to a preference which it claims by reason of the attachment and levies thereunder. That issue has been

created by the operation of the Trading with the Enemy Act, 50 U. S. C. A. Appendix § 1 et seq."

On the defendant's appeal, "taken by direction of * * * the Department of Justice, and the Alien Property Custodian" (see, Notice of Appeal, at p. 67 of the Record on Appeal), the Court of Appeals for the Second Circuit affirmed the judgment of the District Court with an opinion rendered by Judge Learned Hand. Although the Custodian had a proprietary interest under the *res* vesting order in that case, and the appeal was taken by his direction and that of the Department of Justice, nevertheless, no contention was there made that the attachment of Murray Oil Products Co., Inc., was subject to the conditions contained in the proviso of paragraph (4) of the General Ruling.

Furthermore, both the District Court and Court of Appeals were informed, as the record shows, that Executive Order No. 8389, as amended, was in effect, and the Courts did not consider the attachment or the judgment entered in plaintiff's favor as being in violation of the Order, although the defendant contended "that by means of the attachment the plaintiff has obtained an unjust preference over its other creditors; * * *" (146 F. (2d) 382).

Since the attachment on December 23, 1941, by Murray Oil Products Co., Inc. of the accounts of Mitsui & Co., Ltd., a Japanese concern [Japan having been included in Executive Order No. 8389 on June 14, 1941, by Executive Order No. 8832 (6 F. R. 3715]) was not subject to the conditions contained in the proviso of paragraph (4) of General Ruling No. 12, and the attachment there was deemed valid by the Government and considered valid by the District Court and the Circuit Court of Appeals, then, surely, petitioner's attachment levied on January 21, 1942, is not subject to those conditions and must likewise be deemed valid.

(e) *The Attorney General's interpretation of paragraph (4) of General Ruling No. 12 is unintelligible.*

The Attorney General recognizes that by itself, and without reference to the proviso that immediately follows, the first part of paragraph (4) is an authorization for petitioner's attachment. However, the Attorney General has taken the position that the proviso of paragraph (4) overrides the preceding grant of validity to the attachment. By the proviso, says the Attorney General, petitioner's attachment has no legal effect.

This contention renders paragraph (4) of General Ruling No. 12 utterly absurd. By the opening clause thereof, the Treasury authorizes and encourages litigants to institute actions by attachment of the debtors' blocked assets in the United States. But, by virtue of the proviso, says the Attorney General, the attachment will get the plaintiff nowhere, for the attachment is invalid. This interpretation of the proviso results in paragraph (4) of the General Ruling nullifying what it purports to grant and, therefore, according to the Attorney General, is a meaningless collection of words.

In *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51, 54, Judge Cardozo pointed out that this Court, in *U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81, and *Weeds, Inc.* v. *U. S.*, 255 U. S. 109, determined the prohibition of the Lever Act to be "a nullity because too vague to be *intelligible.*" Judge Cardozo went on to say, at page 54:

> "A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed."

So here, too, paragraph (4) of the General Ruling, as interpreted by the Attorney General, is a nullity because such interpretation renders it unintelligible.

(f) *Furthermore, General Ruling No. 12 has no relevancy here for it came after petitioner's attachment and was adopted in haste for the purpose of shaping the decision in Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei, 288 N. Y. 332.*

General Ruling No. 12 was promulgated on April 21, 1942, exactly three months after the issuance and levy of petitioner's attachment. Consequently, it has no relevancy here for this Court, in *Propper* v. *Clark*, 337 U. S. 472, in referring to the Ruling, stated, at page 485:

> "General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as decisive in this case."

In addition, it is to be noted that General Ruling No. 12 was adopted in haste in order to shape the decision of the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332. That case was argued in the New York Court of Appeals on March 18, 1942 (See 288 N. Y. 332, at p. 333). The Government's brief, *amicus curiae*, in that case is dated April 22, 1942, and was filed "pursuant to leave granted by the Court on April 14, 1942" (page 1 of the Government's brief in that case). General Ruling No. 12 was issued on April 21, 1942, a week after the Government was granted leave to file its brief. In referring to these facts, Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 Harv. L. Rev. 30, 67 (footnote 158), states:

> "Such incidents can hardly engender confidence in, or respect for, administrative practice * * *."

III

Propper v. _Clark_, 337 U. S. 472, cannot be regarded as authority for the proposition that Executive Order No. 8389, as amended, forbade the commencement of actions against blocked nationals by attachment of their assets, particularly since the Attorney General has conceded that such attachments were authorized, but on the contrary this Court's decision in that case indicates that the Executive Order does not forbid such attachments.

Furthermore, this Court's decision in _Lyon_ v. _Singer_ and _Lyon_ v. _Banque Mellie Iran_, 339 U. S. 841, which involved unauthorized transactions covered by the Order, has in effect approved _Commission for Polish Relief, Ltd._ v. _Banca Nationala a Rumaniei_, 288 N. Y. 332, which held, as is conceded here, that the Order did not forbid the commencement of suits against blocked nationals by attachment of their blocked assets, for if the unauthorized transactions in _Singer_ and _Mellie Iran_ gave rise to enforceable rights, then, surely, petitioner's concededly authorized attachment here gave rise to an enforceable attachment lien.

The transaction involved in the *Propper* case was an unauthorized transfer by judicial order of title to blocked property from an Austrian corporation to a receiver appointed under Section 977(b) of the New York Civil Practice Act. This Court held that the freezing order merely directed against

> "shifts in title to blocked assets"

and clearly pointed out that it was not deciding

> "whether every determination of rights concerning blocked property" in unauthorized "litigation is voidable."

This is manifest from the following, at page 486 of the report:

> "It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10,

1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this."

But, the levy of petitioner's provisional attachment under New York law did not shift the title to the attached property. It impressed a lien upon the attached accounts which are merely held in the custody of the law as security for any judgment which the petitioner, as attaching creditor, recovers.

In *Klinck* v. *Kelly*, 63 Barb. (N. Y.) 622, 629, the Court held:

"The goods had been seized by the sheriff by virtue of an attachment against Folger & Tibbs. But this did not alter the general property in the goods, or disable Folger & Tibbs from making a sale of them, subject to the rights acquired by means of the attachment. The attachment created a lien only. The goods were held by the sheriff contingently 'as security for such judgment as the attaching creditor might recover.' * * * and upon payment of the debt and all costs of the proceeding, it was the duty of the sheriff to restore the property."

To the same effect, see:

Sanders v. *Armour Fertilizer Works*, 292 U. S. 190, 208 (dissenting opinion of Mr. Justice Cardozo citing *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101, 103, as the authority in New York);

Steingut v. *National City Bank of New York*, 38 F. Supp. 451, 452;
Columbia Bank v. *Ingersoll*, 21 Abb. N. Cas. (N. Y.) 241;
Fielmann v. *Brunner*, 2 Hun (N. Y.) 354, 356, 357;
Embree v. *Hanna*, 5 Johns. (N. Y.) 101, 103;
West Virginia Pulp & Paper Co. v. *People's Home Journal, Inc.*, 233 App. Div. (N. Y.) 376, 377.

That the levy of a New York provisional attachment does not shift title to the attached property, but creates a lien dating from the original levy, was made clear by the Court of Appeals for the Second Circuit in *Elkay Reflector Corporation* v. *Savory, Inc.*, 57 F. (2d) 161, which held that a New York attachment lien obtained against a debtor prior to the four-month period next preceding the filing of a petition in bankruptcy was unassailable, although it ripened into a judgment within such period.

Therefore, the decision in the *Propper* case is clearly distinguishable and does not have any application to the causes at bar, which do not involve a *shift in title* to blocked property.

The *Propper* case is also inapplicable here for the reason that the Attorney General did not concede there that the appointment of the permanent receiver under Section 977(b) of the New York Civil Practice Act was not forbidden by the Order and it did not appear there that the Treasury had authorized such an appointment, whereas, here the Attorney General has not only conceded that the Order does not forbid the commencement of suits by attachment of blocked assets, but, also, that the Treasury authorized such suits.

Apart from the foregoing, this Court's opinion in the *Propper* case indicates clearly that the bringing of an action by attachment of blocked assets was not forbidden

because an attachment does not seize title to the attached property. *Propper* contended that a "vesting of title" in the receiver was "an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a non-resident" served by publication. This Court pointed out that the New York Court could have acquired jurisdiction over the blocked assets in a way other than by seizure of title such as, for example, by an attachment. This is apparent from the following (337 U. S. 472, at page 488):

> "Petitioner contends here for the first time that a vesting of title in the temporary receiver is an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the State of a nonresident association which is served by publication. The contention is that an affirmance of the court below on the issue of state law will render proceedings under § 977-b subject to an attack on constitutional grounds under the doctrine of Pennoyer v. Neff, 95 U. S. 714. In our opinion the argument is without merit. Pennoyer v. Neff merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at page 733 that for an *in rem* action it is sufficient that the property be within the state, subject to the control of the court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. Cf. Milliken v. Meyer, 311 U. S. 457, 463. The first requirement can be met *in other ways than seizure of title*, e.g., by an injunction against transfer of the property, Pennington v. Fourth National Bank, 243 U. S. 269; *by an attachment*, Herbert v. M. Bicknell, 233 U. S. 70; * * *." (Italics supplied.)

Furthermore, this Court, in affirming the judgments of the New York Court of Appeals in *Lyon* v. *Singer* and

Lyon v. *Banque Mellie Iran*, 339 U. S. 841, has, in effect, approved the holding of the New York Court of Appeals in the earlier case of *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, in which the rationale of the decision is the same as in this Court's *Singer* and *Mellie Iran* decision, namely, the freezing controls did not prevent the accrual or creation of claims or rights, including attachment liens, or render them void but merely prevent payment from the blocked assets in satisfaction thereof without federal authorization.

The decision of the New York Court of Appeals on the federal question presented to this Court in *Singer* and *Mellie Iran* is contained in the following language at 299 N. Y. 790 and 791:

> "Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: 'A federal question was presented and necessarily passed upon by this court, viz: it was held that the provisions of Executive order No. 8389, as amended, and the rules and regulations issued pursuant thereto *did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained* * * *.'" (Italics supplied.)

The amendment of the remittitur was made by the New York Court of Appeals on July 19, 1949, one month after *Propper* v. *Clark* was decided by this Court. Thus, the New York Court of Appeals indicated that the *Propper* case was not applicable.

In *Singer* and *Mellie Iran*, this Court sustained the holding of the New York Court of Appeals that *Singer* and *Mellie Iran* were not prevented by the Order from acquiring the status of preferred creditors under New York law against the New York Superintendent of Banks, who was

acting for the Custodian in liquidating the New York branch of the Yokohama Specie Bank, Ltd. (299 N. Y. 113, 139), for the reason that "federal control over alien property remains undiminished" in view of the fact that the "New York Court conditioned enforcement of the claims upon licensing by the Alien Property Custodian". The Custodian, who had vested the "excess proceeds of the property * * * of the Yokohama Specie Bank, Ltd." (299 N. Y. 125) appeared as *amicus curiae* in these cases and advanced the very contentions made by him here.

Manifestly, this Court's determination in *Singer* and *Mellie Iran* is a repudiation of the Custodian's contention here that the freezing order prevented the acquisition of any lien or of any claim in frozen funds. There, the transactions were plainly unauthorized by the wording of the Order and there was no concession that the Secretary had authorized them. Since this Court held that the transactions gave rise to enforceable rights, surely, it must follow that the attachment here, which was not covered by the wording of the Order and concededly authorized by the Secretary, likewise gave rise to an enforceable attachment lien.

This Court also indicated in *Singer* and *Mellie Iran* that the *Propper* case was inapplicable because *Propper*, as Receiver, "claimed title" to the blocked assets "adversely to the Custodian, and sought to deny the Custodian's power to vest the property" (339 U. S. 841, 842-3), and no such result would follow from the judgments in *Singer* and *Mellie Iran*. So, too, the *Propper* case is not controlling here for the reason that petitioner does not claim title to the attached Reichsbank accounts adversely to the Custodian and does not deny his paramount power to vest, but claims a lien thereon by his attachment, concededly authorized, and for the further reason that federal control over the property remains undiminished because the enforcement of petitioner's claim by payment of the judgment re-

covered in his attachment action against Reichsbank is under *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, conditioned upon licensing by the Alien Property Custodian.

Petitioner's lien on the Reichsbank accounts is not affected by the Vesting Orders. In *United States* v. *The Antoinetta*, 153 F. (2d) 138, certiorari denied, *Societa Anonima Cooperative di Navigazione Garibaldi* v. *United States*, 329 U. S. 821, it appeared that the Custodian had seized a cargo of oil on the "Brennero," an Italian vessel, as well as the vessel itself, and counsel for the claimants asserted a proctor's lien against the proceeds of the sale of the oil, deposited in the court registry, in support of his claim for compensation for his services. The Court of Appeals for the Third Circuit held, at page 143:

> "The Custodian, however, seized the cargo as well as the ship. The seizure vested title to the oil in the Custodian. If the proctor had a valid lien prior to the seizure, the lien would not be affected by the seizure."

A determination by this Court sustaining petitioner's attachment would be no more adverse to the Custodian than this Court's determination in *Singer* and *Mellie Iran* for, to the extent that petitioner succeeds here in enforcing his claim by the authorization of the Custodian for payment of the judgment, the Reichsbank accounts will be diminished just as the assets vested by the Custodian in *Singer* and *Mellie Iran* are diminished by an authorization for the payment of the plaintiffs' claims which this Court sustained in those cases.

IV

The District Court was required to give full faith and credit to petitioner's New York attachment and should have declined to entertain these causes, particularly since the Attorney General's petitions instituting these proceedings constitute a colorable attempt to meet federal jurisdictional requirements in order to oust the New York Court of its jurisdiction over the attached accounts. *Markham* v. *Allen*, 326 U. S. 490, is clearly distinguishable and does not avoid the impact of the requirement of full faith and credit to petitioner's attachment.

In *Matter of United States of Mexico* v. *Schmuck*, 294 N. Y. 265, 268, the New York Court of Appeals, following *Cooper* v. *Reynolds*, 77 U. S. 308, held that property upon which a levy is made pursuant to the process of a court

> "is in the custody of the law and the Court has jurisdiction over such property."

This Court said, in *Cooper* v. *Reynolds*, at page 317:

> "So also while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of * * * attachment, or other form of service, on a party holding a fund which

becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

Therefore, petitioner's attachment on Reichsbank's accounts with the two banks brought the accounts under the jurisdiction of the New York Court.

The effect of the service of the attachment writ upon Chase and Federal Reserve was to forbid the banks from paying over the attached accounts to anyone other than the Sheriff except by the Sheriff's direction or pursuant to an order of the New York Court. A payment in disregard of this prohibition is a violation of a lawful mandate of the New York Court, constituting a contempt of court punishable by imprisonment and a fine equal to the amount of the judgment with interest.

New York Civil Practice Act, Sec. 917;
New York Judiciary Law, Secs. 750, 753, 773;
Peo. ex rel. Cauffman v. *Van Buren*, 136 N. Y. 252;
Clark v. *Bininger*, 75 N. Y. 344;
Lowenthal v. *Hodge*, 120 App. Div. (N. Y.) 304.

The injunction against payment by the two banks to anyone other than the Sheriff who levied the attachment cannot, as a matter of law, be disobeyed.

U. S. v. *United Mine Workers*, 330 U. S. 258;
Howat v. *Kansas*, 258 U. S. 181;
Peo. ex rel. Cauffman v. *Van Buren*, 136 N. Y. 252;
Peo. ex rel. Davis & Palmer v. *Sturtevant*, 9 N. Y. 263.

Full faith and credit was required to be given by the District Court to petitioner's New York attachment.

In *American Surety Co.* v. *Baldwin*, 287 U. S. 156, Mr. Justice Brandeis, for the Court, said at page 166:

> "The full faith and credit clause, Const. art. 4, § 1, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. § 905 (28 U. S. C. A. § 687); Mills v. Duryee, 7 Cranch. 481, 485, 3 L. Ed. 411; Mutual L. Insurance Co. v. Harris, 97 U. S. 331, 24 L. Ed. 959. Compare Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 155, 52 S. Ct. 571, 76 L. Ed. 1026."

In *Huron Holding Corporation* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, this Court held that by reason of the constitutional requirement that full faith and credit be given the actions of a State Court, both the State and the Federal Courts should give full faith and credit to the attachment of a New York State Court.

Mr. Justice Black, writing for the unanimous Court said, at page 193:

> "For it is now settled that attachment is wholly the creature of, and controlled by, the law of the state; property and persons within the state can be subjected to the operation of that local law; power over the person who owes a debt confers jurisdiction on the courts of the state where the writ of attachment issues; and *by reason of the constitutional requirement that full faith and credit be given the valid actions of a state, courts of one state must recognize valid attachment judgments of other states. And under congressional enactment federal courts must also give full faith and credit.*" (Italics supplied.)

See also:

Sanders v. *Armour Fertilizer Works*, 292 U. S. 190.

Judge Bondy, in *Steingut* v. *National City Bank of New York*, 38 F. Supp. 451, recognized that full faith and credit must be given to a New York attachment proceeding in the following language, at page 452:

> "It has been specifically held by a New York court that, when a lien had been acquired on a bank deposit by a warrant of attachment, it was error to permit the credit balance to be given to the receiver of the depositor because to do so interfered with the lien. West Virginia Pulp & Paper Co. v. Peoples' Home Journal, Inc., 233 App. Div. 376, 253 N. Y. S. 178.
>
> "*Full faith and credit must be given to the New York attachment proceedings.* See Sanders v. Armour Fertilizer Works, 292 U. S. 190, 54 S. Ct. 677, 78 L. Ed. 1206, 91 A. L. R. 950; Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; 28 U. S. C. A. § 687."

Here, the Attorney General is seeking to interfere with the New York Court's control of the attached property by a Federal Court declaration that he is entitled to possession of the attached accounts so that the New York Court will be bound to recognize the Federal Court's declaration of his right to possession of the accounts in proceedings to be instituted by him in the New York Court. This is apparent from the following statement of the Attorney General in his brief in the District Court at pages 5-6:

> "In the present action the Attorney General is * * * requesting only a declaration of rights, and does not seek an order of this Court directing that the funds be surrendered to him. Here, * * * the nature of the judgment requested will interfere with possession of the state court under the writs of attachment only to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here."

Manifestly, since the Attorney General sought a decree declaring that he "is entitled to the possession" (R. 86) of the Reichsbank accounts with Federal Reserve and that petitioner "did not obtain any lien" in the Reichsbank accounts with Chase and, therefore, he "is entitled to the balances remaining in such accounts" (R. 7), which decrees the New York Court "will be bound to recognize", the proceedings in the District Court are colorable attempts to oust the New York Court of its jurisdiction over the attached accounts, and the decrees of the District Court will disturb the control of the attached accounts by the New York Court.

In *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, the New York Superintendent of Insurance had been appointed Liquidator of the United States branches of the Russian insurance companies by an order of the New York Supreme Court. The United States, claiming to be the owner of certain funds which originally had belonged to the Russian insurance companies, brought suit for an accounting and delivery of the funds. Chief Justice Hughes held, at pages 477-478:

> "In both these cases the proceedings in the state court were quasi in rem. Control of the funds was essential to the exercise of the court's jurisdiction to protect the rights of claimants. * * * The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well * * * in suits * * * where, to give effect to its jurisdiction, the court must control the property. * * * If the two suits are *in rem* or *quasi in rem*, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the

jurisdiction of one court must of necessity yield to that of the other. *Penn General Casualty Company v. Pennsylvania*, 294 U. S. 189, 195, 55 S. Ct. 386, 79 L. Ed. 850. This principle is applied in the discharge of the long-recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States' [citing cases].

"The Government urges that the present suits for an accounting are not suits *in rem* but *in personam;* and that to allow the federal court to pass upon the right asserted would not necessarily interfere with the jurisdiction or control by the state court over the *res.* See Kline v. Burke Construction Co., 260 U. S. 226, 230, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. *But these suits are not to enforce a personal liability but to obtain possession of the respective funds. The suits are not merely to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court.* Compare Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 44-46, 30 S. Ct. 10, 54 L. Ed. 80; Riehle v. Margolies, 279 U. S. 218, 223, 224, 49 S. Ct. 310, 73 L. Ed. 669. Complainant demands that the depositaries account and pay over to the complainant, as 'the sole and exclusive owner', the entire funds in their hands. Thus the *object of the suits is to take the property from the depositaries and from the control of the state court,* and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings." (Italics supplied.)

Here, as in that case, the Attorney General's proceedings are "not to enforce a personal liability, but to obtain

possession" of the accounts by Federal Court decrees which he contends the New York Court is bound to recognize. They are *in rem* proceedings which would disturb the dominion already acquired by the New York Court by the levy of the warrant of attachment by the Sheriff who "in making a levy under a warrant of attachment exercises a governmental function conferred upon him by the State."

Stojouski v. *Banque de France*, 294 N. Y. 135, 145.

Since the Attorney General's proceedings sought to nullify the lien of petitioner's attachment and to obtain possession of the attached accounts, he was required to invoke the jurisdiction of the New York Court in the first instance. The New York Court's decision of any federal question raised by the Executive Order could then be reviewed by this Court, for as was said in *United States* v. *Bank of New York and Trust Co.*, 296 U. S., at page 479:

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them. *Robb* v. *Connolly*, 111 U. S. 624, 637. In this instance it cannot be doubted that the United States is free to invoke the jurisdiction of the state court for the determination of its claim, and the decision of the state court of any federal question which may be presented upon such an invocation, may be reviewed by this Court and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided. Jud. Code, § 237, 28 U. S. C. 344."

And again, at pages 480-481:

> "We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity as a sovereign, if it

prosecuted its claim *in the appropriate forum where the funds are held.*" (Italics supplied.)

The Attorney General has relied upon *Markham* v. *Allen*, 326 U. S. 490, in seeking to avoid the impact of the requirement of full faith and credit to petitioner's attachment, contending that upon the authority of that case the District Court had jurisdiction.

But, *Markham* v. *Allen* only decided that a Federal Court of Equity has jurisdiction to entertain a suit in favor of a creditor, legatee, and other claimants, to *establish* a claim against the decedent's estate being administered in a State Probate Court so long as the Federal Court does not disturb or affect the possession of the property in the State Court's custody for the reason that a judgment of the Federal Court in such a suit is merely a decree *in personam* establishing a debt or a right to share in property and, as such, does not disturb the State Court's control of the property. This is apparent from the decision of this Court in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477-478, and, also, from the decision in *Waterman* v. *Canal-Louisiana Bank & Trust Company*, 215 U. S. 33, 43, and the other authorities cited in the *Markham* v. *Allen* opinion for the proposition that the Federal Court has jurisdiction to entertain suits to establish claims against a decedent's estate so long as the Federal Court does not interfere with the probate proceedings or with the control of the property in the State Court's custody. These decisions expressly limit the application of the exercise of Federal Court jurisdiction only to decrees *in personam* establishing a claim against an estate.

As this Court pointed out in *Markham* v. *Allen*, at page 495:

"* * * the judgment declared only that petitioner 'is entitled to receive the net estate * * * in distribution,

after the payment of expenses of administration, debts and taxes.' The effect of the judgment was to leave undisturbed the orderly administration of decedent's estate in the state probate court and to decree petitioner's right in the property to be distributed after its administration. This, as our authorities demonstrate, is not * * * an interference with property in the possession of custody of a state court."

Here, however, the decrees which the Attorney General sought and procured are, in effect, *in rem.* They interfere with the New York Court's control of the attached Reichsbank accounts because they nullify and thereby set aside the lien of petitioner's attachment and, if the New York Court is bound, as a matter of law, to recognize the decrees, the New York Court must void its custody and surrender the attached property to the Attorney General.

In *Spears* v. *Spears*, 162 F. (2d) 345 (6 Cir.), the appellants brought an action in the Federal Court praying for a determination of heirship and construction of the decedent's will, and adjudication of the ownership of a joint bank account, an accounting and a distribution of the estate in accordance with the will which had been probated in Michigan where the administration of estates under Michigan law constituted proceedings *in rem.* The Circuit Court of Appeals, in referring to *Markham* v. *Allen*, held, at pages 348 and 349:

"Appellants' complaint is drawn so as to conceal the fact that they ask this court to set aside the probate of the will of August 27, 1945. *The complaint constitutes a colorable attempt to meet federal jurisdictional requirements in order to oust the state courts of jurisdiction.*

* * * * *

"Appellants rely upon the rule often declared that a federal court cannot properly decline to hear issues in

a suit in which it has jurisdiction merely because the same question is pending in a state court between the same parties. Rogers v. Girard Trust Co., 6 Cir., 159 F. 2d 239; McClellan v. Carland, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762. Moreover, federal courts have jurisdiction in personam to determine certain probate matters in which the state courts have concurrent jurisdiction. Waterman v. Bank & Trust Co., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80. *But they have no equity jurisdiction in such probate matters where the proceedings are in rem.* Broderick's Will, 21 Wall. 503, 88 U. S. 503, 22 L. Ed. 599; Sutton v. English, 246 U. S. 199, 205, 38 S. Ct. 254, 62 L. Ed. 664; Markham v. Allen, supra. The probate of wills and the administration of estates, under Michigan law constitute proceedings in rem. Cf. Farrell v. O'Brien, 199 U. S. 89, 110, 111, 25 S. Ct. 727, 50 L. Ed. 101.

* * * * *

"Moreover, while federal courts of chancery have jurisdiction to establish the claims of creditors, legatees and heirs, they are not authorized to seize and control property which is in the possession of the state court. Waterman v. Bank & Trust Co., supra; Markham v. Allen, supra." (Italics supplied.)

So, here, the proceedings instituted by the Attorney General in the District Court which sought and resulted in decrees declaring the lien of petitioner's attachment to be a nullity, constitute "a colorable attempt to meet federal jurisdictional requirements" by an application of *Markham* v. *Allen* "in order to oust" the New York Court of jurisdiction obtained by the levy of petitioner's attachment, concededly authorized, upon the Reichsbank accounts with the two banks.

V

Since a violation of the Executive Order is an offense under Section 5(b) of the Trading with the Enemy Act, subjecting the offender to a prison term and fine, the decrees of the District Court stamp the levies of petitioner's attachment as offenses under the Order, notwithstanding that (1) the wording of the Order does not plainly forbid suits by attachments of blocked assets and (2) petitioner's attachment was concededly authorized.

Section 8 of the Order incorporates that part of Section 5 (b) of the Trading with the Enemy Act providing for a maximum prison term of ten years and a maximum fine of $10,000.00 for violation of the provisions of Section 5 (b) "or of any license, order, rule or regulation issued thereunder." Therefore, a violation of the Order is an offense under Section 5(b) of the Act, subjecting the offender to a prison term and a fine. However, before conduct can be stamped as an offense under the Order, and, therefore, a crime, it must appear clearly that the conduct constituting the offense has been so designated by the President in the Order.

In *United States* v. *Alpers*, 338 U. S. 680, this Court said, at page 681:

> "We are aware that this is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses. United States v. Resnick, 299 U. S. 207, 210, 57 S. Ct. 126, 127, 81 L. Ed. 127. The most important thing to be determined is the intent of Congress. The language of the statute may not be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent of Congress, United States v. Raynor, 302 U. S. 540, 552, 58 S. Ct. 353, 358, 82 L. Ed. 413."

In *United States* v. *Resnick*, 299 U. S. 207, 209, 210, this Court said:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37; Fasulo v. United States, 272 U. S. 620, 628, 47 S. Ct. 200, 201, 71 L. Ed. 443. The clause just quoted is crucial; its words are plain and, having regard to the connection in which they are used, must be given the meaning naturally attributable to them. * * * Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. United States v. Lacher, 134 U. S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080; United States v. Chase, 135 U. S. 255, 261, 10 S. Ct. 756, 34 L. Ed. 117; Fasulo v. United States, supra, 272 U. S. 620, at page 629, 47 S. Ct. 200, 202, 71 L. Ed. 443."

As pointed out in Point I of this Argument, the Executive Order does not plainly and unmistakably forbid suits by attachment of blocked assets. Therefore, the rule laid down in *United States* v. *Alpers* and *United States* v. *Resnick, supra*, is clearly applicable here, and by holding that petitioner's attachment and levies thereunder were forbidden by the Order, notwithstanding that the Attorney General has here conceded that the attachment and levies were not forbidden and were, in fact, authorized, the District Court stamped the levies of the attachment as an offense under the Order.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Court below should be reversed.

Henry I. Fialman,
Counsel for Petitioner.

January 26, 1951.

APPENDIX

1. Trading With the Enemy Act, Section 7(b), 40 Stat. 417.

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trademark and copyright suits] * * *. And provided further, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

2. Joint Resolution of May 7, 1940, 54 Stat. 179.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require

any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

Sec. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * * *

3. Excerpts from Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as Amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897 and Executive Order No. 8998, December 26, 1941, 6 F. R. 6785.

Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the

United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * *

Section 8. Section 5 (b) of the Act of October 6, 1917, as amended, provides in part:

"* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person may be imprisoned for not more than ten years, or both; and any officer, director, or agent, of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both."

4. General Ruling No. 12, April 21, 1942, 7 F. R. 2991.

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury (a) any transfer after the effective date of the Order [Exec. Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

* * * * * * *

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any

property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

* * * * * * *

5. Press Release No. 34, April 21, 1942, *United States Treasury Department: Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73:

* * * * * * *

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided,* That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

6. Public Circular No. 31, August 2, 1946, 11 F. R. 8351:

* * * * * * *

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere

with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus, the proviso of paragraph (4) specifies that "no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power or privilege with respect to the property.

7. New York Judiciary Law.

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

* * * * * * *

3. Wilful disobedience to its lawful mandate.

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§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or

other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

* * * * * * *

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

* * * * * * *

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

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§ 773. If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount

of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

8. New York Civil Practice Act.

§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publication pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

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§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment-debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

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§ 916. The attachment may also be levied upon:

* * * * * * *

3. A debt arising under or on account of a contract not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

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§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; * * * A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the

defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

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§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action, attached by him, and may

maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

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§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action,

to vacate or modify the warrant, or to increase the security given by the plaintiff, or one or more of those forms of relief together or in the alternative.

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§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

* * * * * * *

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 314

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

No. 315

JOHN F. McCARTHY (with whom the Federal Reserve Bank of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN REPLY FOR THE PETITIONER, JOHN F. McCARTHY

HENRY I. FILLMAN,
Counsel for Petitioner.

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I

The respondent concedes that McCarthy's attachment was not forbidden by the Executive Order. Therefore, the lien created by the levy of the attachment is valid.

At page 49 of his brief the respondent states:

> "Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. *Not attachments, but transfers, were controlled.* (Italics supplied.)

This is a concession by the respondent that McCarthy's attachment was not forbidden by the Executive Order and is valid. Indeed, he cannot take an opposite stand in the face of his stipulation. Therefore, it must follow that the lien created as a matter of New York law by the levy of the attachment upon the Reichsbank accounts is likewise valid.

In seeking to overcome the consequences flowing from his concession, the respondent attempts to bring these cases within the holding of *Propper* v. *Clark*, 337 U. S. 472, that the Executive Order prevented "shifts in title" to blocked property without Treasury authorization, by contending that Section 1 E of the Order prevented the acquisition of a "proprietary interest" in the Reichsbank accounts and that the levy of the attachment resulted in the "transfer" of such an interest, because "it is plain", says the respondent, at page 12, "that the accounts fall within the description 'evidences of indebtedness or evidences of ownership of property'." This contention is without legal basis and overlooks that in the *Propper* case this Court

said, at page 483, that litigation by local claimants in state courts against foreign owners could proceed "so long as payment could not be made without a license" for

> "Nothing in the Trading with the Enemy Act or regulations specifically forbids *eo nomine* litigation in state courts."

The prohibition in Section 1 E of the Order against "transfers * * * or dealings in, any, evidences of indebtedness or evidences of ownership of property", paraphrasing the Joint Resolution, covers, as Judge Learned Hand said in *United States* v. *Leiner*, 143 F. (2d) 298, 300, "the transfer of stocks and bonds". The Reichsbank accounts do not "fall within the description 'evidences of indebtedness or evidences of ownership of property'." This is manifest from an examination of the Order's history.

The Order rests upon and was issued pursuant to Section 5(b) of the Trading with the Enemy Act of 1917 (40 Stat. 415) which gave the President power to "investigate, regulate or prohibit" transactions in foreign exchange as well as the export or earmarking of coin, bullion or currency, transfers of credit "(except where relating solely to transactions to be executed wholly within the United States)", and transfers of evidences of indebtedness or ownership of property either between the United States and a foreign country, or between residents of foreign countries by any person within the United States. Section 5(b) was revised and amended in the 1933 crisis by the Emergency Bank Legislation of 1933 [Sec. 2, Act of March 9, 1933, 48 Stat. 1, 50 U. S. C. App. §5(b) (1940)], so as to permit its application not only during time of war, but also "during any other period of national emergency declared by the President". By this amendment, the President was authorized to regulate transfers of credit between or payments by banking institutions as defined by the President. There was, however, omitted from Section 5(b) the phrase authorizing the regula ion of transfers of "evi-

dences of indebtedness or of the ownership of property", which was originally contained therein. The section, as amended, was invoked in the Banking Holiday [Proclamation No. 2039, March 6, 1933, 31 Code Fed. Regs. (1939), §120.1], and in support of the Government's gold policy [Exec. Orders No. 6102, Apr. 5, 1933; No. 6111, Apr. 20, 1933; No. 6260, Aug. 28, 1933, 31 Code Fed. Regs. (1939), §§50.1-50.11, inc.].

When Germany invaded Norway and Denmark, the President invoked Sec. 5(b), and issued Executive Order No. 8389, freezing property in the United States in which "Norway or Denmark or any national thereof has at any time on or since April 8, 1940 had any interest", in order to assure that title in that property could not be acquired by Germany through the conquest of those countries. In view of the omission in the amendment of 1933 of the phrase authorizing the regulation of transfers of "evidences of indebtedness or of the ownership of property", the Order did not contain the present Section 1 E (See, Appendix, pp. 14-15). Some banks questioned the legality of the Order in so far as it affected stocks and bonds, although the Secretary of the Treasury, in General Ruling No. 2 of April 19, 1940 (5 F. R. 1474), had construed the Order to prohibit bank transfers of stock certificates from or into the names of blocked nationals, and also the delivery out of or receipt into blocked nationals' custody accounts of securities. To remove the doubt, Congress by Joint Resolution, introduced by Senator Wagner, and enacted on May 7, 1940 (54 Stat. 179), amended the Trading with the Enemy Act by re-inserting the provisions for regulations of dealings in "evidences of indebtedness or evidences of ownership of property", so that Section 5(b) would apply to stocks and other securities. By the Joint Resolution, Congress also "appproved and confirmed" the Order, and the regulations and general rulings issued thereunder. Thereupon, the Order was amended by incorporating therein the present Section 1 E.

That only stocks and bonds—not bank accounts—are covered by the wording of Section 1 E is apparent from the Senate Report on the Joint Resolution (S. Rep. No. 1496, 76th Congress, 3d Sess., 1940), the pertinent part of which is set forth in the Appendix hereto at pages 12 *et seq.*

Furthermore, the respondent errs in urging that the levy of the attachment, concededly valid, resulted in the acquisition of a "proprietary interest" in the accounts. He has overlooked the New York authorities referred to in our main brief which hold, as was held by the Federal Court in discussing the New York law in *Starr* v. *Moore*, 22 F. Cas. No. 13319, 3 McLean 542, that the levy of an attachment does not change the title to the attached property even though, as in the case of personalty, it may be taken into the possession and control of the Court's officer, but only enables the attaching creditor to obtain security for an anticipated judgment, and that the general property remains in the defendant-owner who may alienate such property subject to the lien of the attachment.

The respondent has also failed to understand the meaning of a "proprietary interest." "Proprietary" and "ownership" are synonymous. In *Ferguson* v. *Arthur*, 6 S. Ct. 861, 863, this Court said:

> "'Proprietary' is defined thus in the Imperial Dictionary: 'Belonging to ownership; as proprietary rights.' In Webster: 'Belonging or pertaining to a proprietor—' 'proprietor' being defined, 'One who has the legal right or exclusive title to anything, whether in possession or not; an owner.' In Worcester: 'Relating to a certain owner or proprietor.'"

Since the levy of McCarthy's attachment did not under New York law transfer to him the ownership of the Reichsbank accounts, it is clear that the respondent errs

in contending that McCarthy acquired a "proprietary interest" in those accounts by virtue of the levy of the attachment.

The respondent's argument does not nullify his concession that the attachment was not forbidden by the Order and the legal effect of the concession, namely, the levy is valid.

II

By Section 34 of The Trading with the Enemy Act, enacted in 1946, McCarthy's debt claim upon which he based his New York attachment action is entitled to a priority. Furthermore, this Section gives validity to his attachment against Reichsbank, and the lien created thereby.

The claim of McCarthy, as assignee of Congressman Mondell's estate, which was the basis of his action against Reichsbank arose prior to Congressman Mondell's death in 1939 and is one "for legal work, labor and services rendered" Reichsbank "at its special instance and request by Congressman Mondell" (R. 40).

Section 34(g) provides (respondent's brief, p. 63) that debt claims against vested assets of a debtor shall be paid in the following order of priority: (1) Wage and salary claims not to exceed $600; (2) Claims entitled to priority under Sections 191 and 193 of title 31 of the United States Code * * *; (3) All other *claims for services rendered*, for expenses incurred in connection with such services * * *; (4) All other debt claims.

Thus, the claim here is entitled to priority under Section 34, apart from the lien to which the Vesting Orders are subject by reason of the levy of the attachment.

Furthermore, Section 34(i) specifically provides as follows (respondent's brief, p. 64):

"Nothing contained in this section shall bar any person from the prosecution of any suit at law or in

equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder."

Section 34(i) is referred to in the report of the Committee on the Judiciary of the House (Report No. 2398, 79th Congress, 2d Session) on the bill which added Section 34 to the Trading with the Enemy Act, at page 15, in the following language:

"It provides that the debt claim provisions of the bill shall constitute the sole relief of creditors, *except for their right to sue the original debtor or any other person liable.*" (Italics supplied.)

At the time Section 34 became a part of the Trading with the Enemy Act, the freezing controls under Executive Order No. 8389, as amended, were in existence, and they are still in existence, with respect to assets in the United States of German and Japanese nationals. The Congress was aware that Executive Order No. 8389 was in effect at the time it passed the bill which added Section 34 to the Trading with the Enemy Act. In specifically providing that a creditor shall not be barred from suing his alien enemy debtor, the Congress recognized that such suits were not forbidden by the Executive Order and the regulations thereunder in force at the time of the enactment of the bill.

It must follow that the Congress recognized that an attachment against blocked assets within the United States of an alien enemy, necessary to confer jurisdiction upon the Court in any suit brought against the alien enemy, is valid, and was valid at the time Section 34 became a part of the Trading with the Enemy Act, and that the lien created thereby is also valid.

III

The respondent's argument that McCarthy's attachment was not necessary to confer jurisdiction upon the New York court in his action against Reichsbank to recover money in an action at law and that the attachment did not create a present fixed lien is not sustained by New York law.

At pp. 44-46, the respondent urges that McCarthy's attachment was not necessary in order to confer jurisdiction over the Reichsbank upon the New York court, and bases his contention upon a quoted portion of Section 232 (6) of the New York Civil Practic Act, *Feuchtwanger* v. *Central Hanover Bank and Trust Co., et al.*, 288 N. Y. 342, and certain decisions involving the law in other jurisdictions.

The respondent has failed to quote the following portion of Section 232 (6) of the New York Civil Practice Act:

> "or where it appears by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the State"

and has overlooked the decision of the New York Court of Appeals in *Dimmerling* v. *Andrews*, 236 N. Y. 43, cited at p. 18 of our main brief, which clearly held that in an action in New York, such as McCarthy's action in the New York Supreme Court (R. 40), to recover a sum of money only against a non-resident, such as Reichsbank, an order for publication may not be made and the Court cannot obtain jurisdiction of the non-resident defendant unless the defendant's property within the State has first been attached. Judge Andrews, writing for the unanimous Court of Appeals, said, at p. 46:

> "Therefore, when the Civil Practice Act was adopted the intent of the legislature was still further clarified. (Civ. Prac. Act, secs. 232, 493.) The latter section enu-

merates specifically the three classes of cases in which judgment for a sum of money might be obtained against a non-resident upon service by publication. The former consolidated sections 438 and 439 of the Code. Certain verbal alterations were made as to provisions contained in section 438; a new clause was added and then applying to all these provisions, some of which contemplated actions *in rem* where no attachment was required and others actions *in personam*, there was also added the condition that the order must be founded on a verified complaint showing a cause of action against the defendant (actions *in rem*) or in an action *in personam*, a complaint and proof that a warrant of attachment had been levied upon the defendant's property. The intent is unmistakable. *Whatever may have been the former rule now no order of publication in an action to recover a sum of money only against a non-resident may be made except upon proof that his property has been seized.*

"This being so, the action of the Special Term and of the Appellate Division in this case was erroneous. The defendants were non-residents. *The action is to recover a sum of money only.* An order of publication was obtained against them as individuals on July 19, 1922. The papers upon which it was based did not show that any warrant of attachment had been levied upon their property. As a matter of fact such warrant was granted and the levy made only some seven or eight days later. No jurisdiction of the defendants was obtained. There was no authority for the order and it and subsequent proceedings based upon it were without jurisdiction." (Italics supplied.)

The *Feuchtwanger* case is completely irrelevant on the proposition urged by respondent for the plaintiff there did not seek to recover a sum of money only in an action at law but sought to impress a trust upon the deposits

in an action in equity, whereas here McCarthy sought to recover a sum of money only in an action at law.

The decisions involving the jurisdiction of courts of other states referred to by the respondent have no application here. New York law as to jurisdiction upon a non-resident in an action to recover a sum of money only is involved.

In seeking to bolster his argument, the respondent refers, at page 46 of his brief, to the fact that in some states an attachment is not deemed to give a lien prior to a judgment or execution thereof and quotes from Justice Cardozo's opinion in *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, thereby attempting to indicate that in New York McCarthy's attachment did not create a lien when it was levied. But, in quoting from Justice Cardozo's opinion, the respondent has failed to quote the following statement of the learned justice, at pages 207-208, which cites *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101, to the effect that McCarthy's attachment did create a fixed and present lien when levied:

> "What has been written does not go beyond the law as declared in Illinois. The fact is not ignored that there are other jurisdictions in which the process of garnishment receives a different meaning. *Sometimes the service of the writ is held to impose upon the debt a fixed and present lien which will have recognition and enforcement everywhere.* See, e. g., *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101; *Wallace* v. *McConnell*, 13 Pet. 136, 10 L. Ed. 95; In re Ransford (C. C. A.) 194 F. 658, 661; Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144." (Italics supplied.)

In view of the foregoing, the respondent's argument is not sustained by the law of New York.

IV

The respondent's statement that McCarthy is resisting the Custodian's claim to property that was enemy-owned on June 14, 1941, is incorrect.

At page 21 of his brief, the respondent states that McCarthy is seeking "to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941" by a lien which McCarthy claims "to have acquired subsequent to that date" and which he asserts to be indefeasible.

The United States was not at war with Germany on June 14, 1941, when the freezing order was made applicable to German property within the United States, and therefore, the property was not "enemy-owned on June 14, 1941." Furthermore, it was not until March 11, 1942, after McCarthy's attachment, that the President by Executive Order 9095 (7 F. R. 1971) established the office of Alien Property Custodian and delegated to the Custodian the powers granted by Section 5 (b) of the Trading with the Enemy Act.

Furthermore, the respondent did not seek in his proceedings in the District Court a decree which would direct that the attached accounts be turned over to him for, as we pointed out at page 11 of our main brief, the respondent took the position in the District Court that he did not seek an order directing that the funds be surrendered to him and that he was only seeking a decree which he could submit to the New York Supreme Court in later appropriate proceedings to be instituted by him in that court to vacate the attachment. This the respondent does not deny.

Thus, the Custodian was not asserting a claim to the attached property. He took the first step in seeking eventually to nullify the validity of McCarthy's attachment lien.

McCarthy is not attacking the Vesting Orders. He contends that the claim of the Custodian thereunder is subject to the lien of his attachment which the respondent admits is valid.

V

The judgments of the Court below should be reversed.

Respectfully submitted,

HENRY I. FILLMAN,
Counsel for Petitioner.

February 26, 1951.

Appendix

1. Senate Report No. 1496, 76th Congress, 3d Session.

* * * *

"The Committee on Banking and Currency, to whom was referred the joint resolution (S. J. Res. 252) to amend section 5 (b) of the act of October 6, 1917, as amended, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

"The provisions of the resolution were recommended to Congress by the Secretary of the Treasury.

"The purpose of the resolution is to remove any doubt that section 5(b) of the act of October 6, 1917, as amended, authorizes the President to regulate transactions in evidences of indebtedness and evidences of ownership of property in which foreigners have an interest, and to require reports concerning all foreign-owned property.

"The resolution is made necessary by certain questions which have arisen in connection with the Executive order of April 10, 1940, and regulations issued thereunder by the Secretary of the Treasury. The order and regulations were issued pursuant to the authority conferred by section 5(b) of the act of October 6, 1917, as finally amended by section 2 of the act of March 9, 1933. The order and regulations have imposed certain restrictions on transactions in property in which Norway and Denmark or nationals thereof have an interest and have set up a system of licensing transactions in such property.

"The Treasury Department has ruled that the order and regulations of April 10, 1940, apply to transactions in Danish and Norwegian stock and other securities which unquestionably constitute a substantial portion of the property of those countries situated in the United States. With this interpretation of the statute, the order and

regulations this committee is in agreement. It believes that when Congress enacted the act of March 9, 1933, it intended to grant to the President all of the powers conferred upon him by section 5(b) of the act of October 6, 1917, and to authorize him to exercise all of such powers not only in time of war, but during any other period of national emergency. Under the original provision there is no doubt that the President was authorized to regulate transactions in stock and other securities, etc. Notwithstanding this apparent intention of the Congress, a few lawyers for banking institutions have expressed doubts as to whether the President is authorized to regulate transactions in foreign-owned stock and securities. The committee is convinced that the matter is of such great importance that doubts of this character should immediately be removed by a clarifying amendment. Not only is authority to regulate transactions in stock and other securities essential to the system of control already in force, but it may be of even greater importance if it becomes necessary to extend such control to property of other countries which to an even greater extent is in the form of stock and securities. Such an amendment will also serve to protect Americans complying with the order. The banks, in particular, would favor such a clarifying amendment."

"The action taken by the President and the Treasury Department in regulating transactions in Danish and Norwegian property has received the unanimous approval of the public. Section 2 of the resolution provides Congress with a means of expressing its agreement as to the soundness, wisdom, and propriety of such action. Documents indicating the exact character of the action taken are printed as a part of this report.

"Your committee believe that the resolution is meritorious legislation and should be promptly enacted into law.

Appendix

"Executive Order of April 10, 1940, Regulations of the Secretary of the Treasury of April 10, 1940, and General Rulings Issued Thereunder.

EXECUTIVE ORDER

"Amendment of Executive Order No. 6560, dated January 15, 1934, regulating transactions in Foreign Exchange, transfers of credit, and the export of coin and currency.

"By virtue of the authority vested in me by section 5 (b) of the Act of October 6, 1917 (40 Stat. 411), as amended by section 2 of the Act of March 9, 1933 (48 Stat. 1), and by virtue of all other authority vested in me, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do hereby amend Executive Order No. 6560, dated January 15, 1934, regulating transactions in foreign exchange, transfers of credit, and the export of coin and currency by adding the following sections after section 8 thereof:

'SECTION 9. Notwithstanding any of the provisions of sections 1 to 8, inclusive, of this Order, all of the following are prohibited, except as specifically authorized in regulations or licenses issued by the Secretary of the Treasury pursuant to this Order, if involving property in which Norway or Denmark or any national thereof has at any time on or since April 8, 1940, had any interest of any nature whatsoever, direct or indirect:

'A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside of the United States, of a banking institution within the United States);

'B. All payments by any banking institution within the United States;

'C. All transactions in foreign exchange by any person within the United States;

'D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States; and

'E. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * *

THE WHITE HOUSE FRANKLIN D. ROOSEVELT.' ''

April 10, 1940, 6 p. m., E.S.T.